CUSTOMS BULLETIN AND DECISIONS

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Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 12

(T.D. 02–56)

RIN 1515–AD17

EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL MATERIAL FROM GUATEMALA

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: In T.D. 97–81, the Customs Regulations were amended to reflect the imposition of import restrictions on certain archaeological material from Guatemala. These restrictions were imposed pursuant to a Memorandum of Understanding between the United States and Guatemala (the MOU) that was entered into under the authority of the Convention on Cultural Property Implementation Act in accordance with the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Recently, the United States Department of State determined that conditions continue to warrant the imposition of these import restrictions for a period not to exceed 5 years. The Governments of the United States and Mali exchanged diplomatic notes agreeing to extend the MOU. Thus, this document amends the Customs Regulations to reflect that the import restrictions currently in place continue, without interruption, for a period not to exceed five years from September 29, 2002. T.D. 97–81 contains the List of Designated Archaeological Material from Guatemala that describes the articles to which the restrictions and this extension of restrictions apply.

DATES: This regulation and the extension of import restrictions reflected in this regulation become effective on September 29, 2002.

FOR FURTHER INFORMATION CONTACT: (Regulatory Aspects) Joseph Howard, Intellectual Property Rights Branch (202) 572–8701; (Operational Aspects) Al Morawski, Trade Operations (202) 927–0402.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to the provisions of the 1970 UNESCO Convention, codified into U.S. law as the Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq*) (the Act), the United States entered into a bilateral agreement with Guatemala on September 29, 1997 (Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Guatemala Concerning the Imposition of Import Restrictions on Archaeological Objects and Materials from the Pre-Columbian Cultures of Guatemala) (the MOU), concerning the imposition of import restrictions on certain archaeological material from Guatemala. The U.S. Customs Service issued T.D. 97–81 (62 FR 51771, October 3, 1997) amending § 12.104g(a) of the Customs Regulations (19 CFR 12.104g(a)) to reflect the imposition of these restrictions for a period not to exceed five years. The restrictions cover Maya material from the Peten Lowlands and related pre-Columbian material from the Highlands and the Southern Coast of Guatemala. The restrictions became effective on October 3, 1997.

Prior to the issuance of T.D. 97–81, Customs issued T.D. 91–34 (56 FR 15181, April 15, 1991) that imposed emergency import restrictions on certain archaeological material from the Peten Region of Guatemala. Under T.D. 91–34, § 12.104g(b) (19 CFR 12.104g(b)) of the regulations pertaining to emergency restrictions was amended accordingly. These emergency restrictions were extended for a period of three years under T.D. 94–84 (59 FR 55528, November 7, 1994). Subsequently, the same archaeological material covered by T.D. 91–34 (and the extension of T.D. 94–84) was subsumed in T.D. 97–81 when it was published in 1997, at which time the emergency restrictions of T.D. 91–34 (and T.D. 94–84) were removed from § 12.104g(b).

On August 18, 2002, the Assistant Secretary of Educational and Cultural Affairs, Department of State, concluded, among other things, that the cultural patrimony of Guatemala continues to be in jeopardy from pillage of irreplaceable materials representing its Pre-Columbian heritage and made the necessary determinations under 19 U.S.C. 2602(e) and 2602(a) to extend the import restrictions for a period not to exceed five years (in the Determination to Extend the MOU). The Government of the United States and the Government of the Republic of Mali exchanged diplomatic notes on September 20, 2002, agreeing to extend the MOU effective September 29, 2002. Accordingly, Customs is amending § 12.104g(a) to reflect the extension of the import restrictions.

The List of Designated Archaeological Material from Guatemala describing the materials covered by these import restrictions is set forth in T.D. 97–81. The list and accompanying image database may also be found at the following internet website address: http://exchanges.state.gov/culprop.

The restrictions on the importation of these archaeological materials from Guatemala are to continue in effect for five years from September 29, 2002. Importation of these materials continues to be restricted unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

Because the amendment to the Customs Regulations contained in this document extends import restrictions already imposed on the above-listed cultural property of Guatemala by the terms of a bilateral agreement entered into in furtherance of a foreign affairs function of the United States, pursuant to the Administrative Procedure Act (5 U.S.C. 553(a)(1)), notice of proposed rule-making, public procedure, and a delayed effective date are not required.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Accordingly, this final rule is not subject to the regulatory analysis or other requirements of 5 U.S.C 603 and 604.

EXECUTIVE ORDER 12866

This amendment does not meet the criteria of a "significant regulatory action" as described in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service.

LIST OF SUBJECTS IN 19 CFR PART 12

Cultural property, Customs duties and inspections, Imports.

AMENDMENT TO THE REGULATIONS

Accordingly, Part 12 of the Customs Regulations (19 CFR Part 12) is amended as set forth below:

PART 12—[AMENDED]

1. The general authority and specific authority citations for Part 12, in part, continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * * * *

2. In § 12.104g(a), the list of agreements imposing import restrictions on described articles of cultural property of State Parties is amended in

the entry for Guatemala by adding "extended by T.D. 02–56" immediately after "T.D. 97–81" in the column headed "T.D. No.".

ROBERT C. BONNER,
Commissioner of Customs.

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, September 30, 2002 (67 FR 61259)]

(T.D. 02–57)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR SEPTEMBER 2002

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 02–41 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): September 2, 2002.

Brazil real:

September 1, 2002	$0.333000
September 2, 2002	.333000
September 3, 2002	.322373
September 4, 2002	.319081
September 5, 2002	.318218
September 6, 2002	.314961
September 7, 2002	.314961
September 8, 2002	.314961
September 9, 2002	.320256
September 10, 2002	.317360
September 11, 2002	.321543
September 12, 2002	.321440
September 13, 2002	.317965
September 14, 2002	.317965
September 15, 2002	.317965
September 16, 2002	.313480
September 17, 2002	.310126
September 18, 2002	.298954
September 19, 2002	.293169
September 20, 2002	.291121
September 21, 2002	.291121
September 22, 2002	.291121
September 23, 2002	.280191
September 24, 2002	.277008

FOREIGN CURRENCIES—Variances from quarterly rates for September 2002 (continued):

Brazil real (continued):	
September 25, 2002	$0.269542
September 26, 2002	.265252
September 27, 2002	.260756
September 28, 2002	.260756
September 29, 2002	.260756
September 30, 2002	.262950
South Africa rand:	
September 3, 2002	$0.093088
September 4, 2002	.093633
September 5, 2002	.094518
September 10, 2002	.093914
September 11, 2002	.094429
September 16, 2002	.093197
September 17, 2002	.094518
September 18, 2002	.094340
September 20, 2002	.094429
September 21, 2002	.094429
September 22, 2002	.094429
September 23, 2002	.093633
September 24, 2002	.093545
September 25, 2002	.094429
Venezuela bolivar:	
September 10, 2002	$0.000679
September 11, 2002	.000669
September 27, 2002	.000679
September 28, 2002	.000679
September 29, 2002	.000679
September 30, 2002	.000679

Dated: October 1, 2002.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 02–58)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR SEPTEMBER 2002

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): September 2, 2002.

Austria schilling:	
September 1, 2002	$0.071263
September 2, 2002	.071263
September 3, 2002	.072375
September 4, 2002	.072113
September 5, 2002	.072026
September 6, 2002	.071532
September 7, 2002	.071532
September 8, 2002	.071532
September 9, 2002	.071343
September 10, 2002	.070871
September 11, 2002	.070667
September 12, 2002	.070936
September 13, 2002	.070805
September 14, 2002	.070805
September 15, 2002	.070805
September 16, 2002	.070660
September 17, 2002	.070384
September 18, 2002	.071139
September 19, 2002	.071343
September 20, 2002	.071503
September 21, 2002	.071503
September 22, 2002	.071503
September 23, 2002	.071379
September 24, 2002	.071328
September 25, 2002	.071198
September 26, 2002	.070892
September 27, 2002	.071016
September 28, 2002	.071016
September 29, 2002	.071016
September 30, 2002	.071793
Belgium franc:	
September 1, 2002	$0.024308
September 2, 2002	.024308
September 3, 2002	.024688
September 4, 2002	.024598
September 5, 2002	.024569
September 6, 2002	.024400
September 7, 2002	.024400
September 8, 2002	.024400
September 9, 2002	.024336

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for September 2002 (continued):

Belgium franc (continued):

September 10, 2002	$0.024175
September 11, 2002	.024105
September 12, 2002	.024197
September 13, 2002	.024152
September 14, 2002	.024152
September 15, 2002	.024152
September 16, 2002	.024103
September 17, 2002	.024008
September 18, 2002	.024266
September 19, 2002	.024336
September 20, 2002	.024390
September 21, 2002	.024390
September 22, 2002	.024390
September 23, 2002	.024348
September 24, 2002	.024331
September 25, 2002	.024286
September 26, 2002	.024182
September 27, 2002	.024224
September 28, 2002	.024224
September 29, 2002	.024224
September 30, 2002	.024489

Finland markka:

September 1, 2002	$0.164925
September 2, 2002	.164925
September 3, 2002	.167498
September 4, 2002	.166893
September 5, 2002	.166691
September 6, 2002	.165547
September 7, 2002	.165547
September 8, 2002	.165547
September 9, 2002	.165110
September 10, 2002	.164017
September 11, 2002	.163546
September 12, 2002	.164168
September 13, 2002	.163865
September 14, 2002	.163865
September 15, 2002	.163865
September 16, 2002	.163529
September 17, 2002	.162890
September 18, 2002	.164639
September 19, 2002	.165110
September 20, 2002	.165480
September 21, 2002	.165480
September 22, 2002	.165480
September 23, 2002	.165194
September 24, 2002	.165076
September 25, 2002	.164774
September 26, 2002	.164067
September 27, 2002	.164353
September 28, 2002	.164353
September 29, 2002	.164353
September 30, 2002	.166153

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for September 2002 (continued):

France franc:	
September 1, 2002	$0.149492
September 2, 2002	.149492
September 3, 2002	.151824
September 4, 2002	.151275
September 5, 2002	.151092
September 6, 2002	.150056
September 7, 2002	.150056
September 8, 2002	.150056
September 9, 2002	.149659
September 10, 2002	.148668
September 11, 2002	.148241
September 12, 2002	.148805
September 13, 2002	.148531
September 14, 2002	.148531
September 15, 2002	.148531
September 16, 2002	.148226
September 17, 2002	.147647
September 18, 2002	.149232
September 19, 2002	.149659
September 20, 2002	.149995
September 21, 2002	.149995
September 22, 2002	.149995
September 23, 2002	.149735
September 24, 2002	.149629
September 25, 2002	.149354
September 26, 2002	.148714
September 27, 2002	.148973
September 28, 2002	.148973
September 29, 2002	.148973
September 30, 2002	.150604
Germany Deutsche mark:	
September 1, 2002	$0.501373
September 2, 2002	.501373
September 3, 2002	.509196
September 4, 2002	.507355
September 5, 2002	.506741
September 6, 2002	.503265
September 7, 2002	.503265
September 8, 2002	.503265
September 9, 2002	.501935
September 10, 2002	.498612
September 11, 2002	.497180
September 12, 2002	.499072
September 13, 2002	.498152
September 14, 2002	.498152
September 15, 2002	.498152
September 16, 2002	.497129
September 17, 2002	.495186
September 18, 2002	.500504
September 19, 2002	.501935
September 20, 2002	.503060
September 21, 2002	.503060
September 22, 2002	.503060
September 23, 2002	.502191
September 24, 2002	.501833

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for September 2002 (continued):

Germany Deutsche mark (continued):

September 25, 2002	$0.500913
September 26, 2002	.498765
September 27, 2002	.499634
September 28, 2002	.499634
September 29, 2002	.499634
September 30, 2002	.505105

Greece drachma:

September 1, 2002	$0.002878
September 2, 2002	.002878
September 3, 2002	.002923
September 4, 2002	.002912
September 5, 2002	.002909
September 6, 2002	.002889
September 7, 2002	.002889
September 8, 2002	.002889
September 9, 2002	.002881
September 10, 2002	.002862
September 11, 2002	.002854
September 12, 2002	.002865
September 13, 2002	.002859
September 14, 2002	.002859
September 15, 2002	.002859
September 16, 2002	.002853
September 17, 2002	.002842
September 18, 2002	.002873
September 19, 2002	.002881
September 20, 2002	.002887
September 21, 2002	.002887
September 22, 2002	.002887
September 23, 2002	.002882
September 24, 2002	.002880
September 25, 2002	.002875
September 26, 2002	.002863
September 27, 2002	.002868
September 28, 2002	.002868
September 29, 2002	.002868
September 30, 2002	.002899

Ireland pound:

September 1, 2002	$1.245105
September 2, 2002	1.245105
September 3, 2002	1.264532
September 4, 2002	1.259961
September 5, 2002	1.258437
September 6, 2002	1.249803
September 7, 2002	1.249803
September 8, 2002	1.249803
September 9, 2002	1.246502
September 10, 2002	1.238249
September 11, 2002	1.234693
September 12, 2002	1.239391
September 13, 2002	1.237106
September 14, 2002	1.237106
September 15, 2002	1.237106
September 16, 2002	1.234566

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for September 2002 (continued):

Ireland pound (continued):	
September 17, 2002	$1.229741
September 18, 2002	1.242947
September 19, 2002	1.246502
September 20, 2002	1.249295
September 21, 2002	1.249295
September 22, 2002	1.249295
September 23, 2002	1.247137
September 24, 2002	1.246248
September 25, 2002	1.243962
September 26, 2002	1.238629
September 27, 2002	1.240788
September 28, 2002	1.240788
September 29, 2002	1.240788
September 30, 2002	1.254374
Italy lira:	
September 1, 2002	$0.000506
September 2, 2002	.000506
September 3, 2002	.000514
September 4, 2002	.000512
September 5, 2002	.000512
September 6, 2002	.000508
September 7, 2002	.000508
September 8, 2002	.000508
September 9, 2002	.000507
September 10, 2002	.000504
September 11, 2002	.000502
September 12, 2002	.000504
September 13, 2002	.000503
September 14, 2002	.000503
September 15, 2002	.000503
September 16, 2002	.000502
September 17, 2002	.000500
September 18, 2002	.000506
September 19, 2002	.000507
September 20, 2002	.000508
September 21, 2002	.000508
September 22, 2002	.000508
September 23, 2002	.000507
September 24, 2002	.000507
September 25, 2002	.000506
September 26, 2002	.000504
September 27, 2002	.000505
September 28, 2002	.000505
September 29, 2002	.000505
September 30, 2002	.000510
Luxembourg franc:	
September 1, 2002	$0.024308
September 2, 2002	.024308
September 3, 2002	.024688
September 4, 2002	.024598
September 5, 2002	.024569
September 6, 2002	.024400
September 7, 2002	.024400
September 8, 2002	.024400

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for September 2002 (continued):

Luxembourg franc (continued):

September 9, 2002	$0.024336
September 10, 2002	.024175
September 11, 2002	.024105
September 12, 2002	.024197
September 13, 2002	.024152
September 14, 2002	.024152
September 15, 2002	.024152
September 16, 2002	.024103
September 17, 2002	.024008
September 18, 2002	.024266
September 19, 2002	.024336
September 20, 2002	.024390
September 21, 2002	.024390
September 22, 2002	.024390
September 23, 2002	.024348
September 24, 2002	.024331
September 25, 2002	.024286
September 26, 2002	.024182
September 27, 2002	.024224
September 28, 2002	.024224
September 29, 2002	.024224
September 30, 2002	.024489

Netherlands guilder:

September 1, 2002	$0.444977
September 2, 2002	.444977
September 3, 2002	.451920
September 4, 2002	.450286
September 5, 2002	.449742
September 6, 2002	.446656
September 7, 2002	.446656
September 8, 2002	.446656
September 9, 2002	.445476
September 10, 2002	.442526
September 11, 2002	.441256
September 12, 2002	.442935
September 13, 2002	.442118
September 14, 2002	.442118
September 15, 2002	.442118
September 16, 2002	.441211
September 17, 2002	.439486
September 18, 2002	.444205
September 19, 2002	.445476
September 20, 2002	.446474
September 21, 2002	.446474
September 22, 2002	.446474
September 23, 2002	.445703
September 24, 2002	.445385
September 25, 2002	.444568
September 26, 2002	.442663
September 27, 2002	.443434
September 28, 2002	.443434
September 29, 2002	.443434
September 30, 2002	.448289

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for September 2002 (continued):

Portugal escudo:	
September 1, 2002	$0.004891
September 2, 2002	.004891
September 3, 2002	.004968
September 4, 2002	.004950
September 5, 2002	.004944
September 6, 2002	.004910
September 7, 2002	.004910
September 8, 2002	.004910
September 9, 2002	.004897
September 10, 2002	.004864
September 11, 2002	.004850
September 12, 2002	.004869
September 13, 2002	.004860
September 14, 2002	.004860
September 15, 2002	.004860
September 16, 2002	.004850
September 17, 2002	.004831
September 18, 2002	.004883
September 19, 2002	.004897
September 20, 2002	.004908
September 21, 2002	.004908
September 22, 2002	.004908
September 23, 2002	.004899
September 24, 2002	.004896
September 25, 2002	.004887
September 26, 2002	.004866
September 27, 2002	.004874
September 28, 2002	.004874
September 29, 2002	.004874
September 30, 2002	.004928
South Korea won:	
September 1, 2002	$0.000832
September 2, 2002	.000832
September 3, 2002	.000833
September 4, 2002	.000837
September 5, 2002	.000839
September 6, 2002	.000836
September 7, 2002	.000836
September 8, 2002	.000836
September 9, 2002	.000836
September 10, 2002	.000837
September 11, 2002	.000826
September 12, 2002	.000833
September 13, 2002	.000831
September 14, 2002	.000831
September 15, 2002	.000831
September 16, 2002	.000820
September 17, 2002	.000821
September 18, 2002	.000824
September 19, 2002	.000826
September 20, 2002	.000826
September 21, 2002	.000826
September 22, 2002	.000826
September 23, 2002	.000819
September 24, 2002	.000812

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for September 2002 (continued):

South Korea won (continued):

September 25, 2002	$0.000810
September 26, 2002	.000814
September 27, 2002	.000814
September 28, 2002	.000814
September 29, 2002	.000814
September 30, 2002	.000815

Spain peseta:

September 1, 2002	$0.005894
September 2, 2002	.005894
September 3, 2002	.005985
September 4, 2002	.005964
September 5, 2002	.005957
September 6, 2002	.005916
September 7, 2002	.005916
September 8, 2002	.005916
September 9, 2002	.005900
September 10, 2002	.005861
September 11, 2002	.005844
September 12, 2002	.005866
September 13, 2002	.005856
September 14, 2002	.005856
September 15, 2002	.005856
September 16, 2002	.005844
September 17, 2002	.005821
September 18, 2002	.005883
September 19, 2002	.005900
September 20, 2002	.005913
September 21, 2002	.005913
September 22, 2002	.005913
September 23, 2002	.005903
September 24, 2002	.005899
September 25, 2002	.005888
September 26, 2002	.005863
September 27, 2002	.005873
September 28, 2002	.005873
September 29, 2002	.005873
September 30, 2002	.005937

Taiwan N.T. dollar:

September 1, 2002	$0.029206
September 2, 2002	.029206
September 3, 2002	.029129
September 4, 2002	.029206
September 5, 2002	.029308
September 6, 2002	.029308
September 7, 2002	.029308
September 8, 2002	.029308
September 9, 2002	.029206
September 10, 2002	.029155
September 11, 2002	.029087
September 12, 2002	.029061
September 13, 2002	.029061
September 14, 2002	.029061
September 15, 2002	.029061
September 16, 2002	.028777

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for September 2002 (continued):

Taiwan N.T. dollar (continued):

September 17, 2002	$0.028752
September 18, 2002	.028827
September 19, 2002	.028893
September 20, 2002	.028760
September 21, 2002	.028760
September 22, 2002	.028760
September 23, 2002	.028752
September 24, 2002	.028727
September 25, 2002	.028653
September 26, 2002	.028588
September 27, 2002	.028637
September 28, 2002	.028637
September 29, 2002	.028637
September 30, 2002	.028637

Dated: October 1, 2002.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 02–60)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE: OCTOBER 1, 2002 THOUGH DECEMBER 31, 2002

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.542200
Brazil	Real	0.270856
Canada	Dollar	0.630398
China, P.R.	Yuan	0.120811
Denmark	Krone	0.132723
Hong Kong	Dollar	0.128213
India	Rupee	0.020665
Japan	Yen	0.008148
Malaysia	Ringgit	0.263158
Mexico	New Peso	0.098406
New Zealand	Dollar	0.471000
Norway	Krone	0.134680

Country	Name of currency	U.S. dollars
Singapore	Dollar	$0.559065
South Africa	Rand	0.095969
Sri Lanka	Rupee	0.010373
Sweden	Krona	0.108472
Switzerland	Franc	0.675995
Thailand	Baht	0.022999
United Kingdom	Pound Sterling	1.570800
Venezuela	Bolivar	0.000680

Dated: October 1, 2002.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 2, 2002.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF LED DISPLAY MODULES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to tariff classification of LED display modules.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of certain LED display modules under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before November 15, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the U.S. Customs Service, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, General Classification Branch, (202) 572–8780.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the classification of certain LED display modules. Although in this notice Customs is specifically referring to one ruling, NY I82314, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or simi-

lar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY I82314 dated June 19, 2002, set forth as Attachment A to this document, Customs classified certain LED display modules in subheading 8531.90.90, HTSUS, as: "Electric sound or visual signalling apparatus * * * other than those of heading 8512 or 8530; parts thereof: * * * Parts: * * * Other: * * * Other."

It is now Customs position that the LED display modules are classified in subheading 8530.90.00, HTSUS, as: "Electrical signalling, safety or traffic control equipment for railways, streetcar lines, subways, roads * * *; parts thereof: * * * Parts." Proposed HQ 965802 revoking NY I82314 is set forth as Attachment B.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY I82314 and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 965802. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: September 30, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 19, 2002.
CLA–2–85:RR:NC:1:112 I82314
Category: Classification
Tariff No. 8531.90.9000

MR. LAYNE MOSTAD
CAPTUS INTERNATIONAL, INC.
112 Eighth Street W.
Brookings, SD 57006–1143

Re: The tariff classification of LED modules from China.

DEAR MR. MOSTAD:

In your letter dated May 13, 2002 you requested a tariff classification ruling.

As indicated by the submitted descriptive literature, the LED modules consist of a circuit board populated with electronic components and light emitting diodes (LED's). These modules are designed to be incorporated into electronic displays that are used for traffic management on highways and other roads. The displays provide information on traffic conditions.

The applicable subheading for the LED modules will be 8531.90.9000, Harmonized Tariff Schedule of the United States (HTS), which provides for parts of electric sound or visual signaling apparatus: Other: Other. The rate of duty will be 1.3 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist David Curran at 646–733–3017.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.
CLA–2 RR:CR:GC 965802 GOB
Category: Classification
Tariff No. 8530.90.00

LAYNE R. MOSTAD
PRESIDENT
CAPTUS INTERNATIONAL
112 Eighth Street W.
Brookings, SD 57006–1143

Re: Revocation of I82314; LED Display Modules.

DEAR MR. MOSTAD:

This is in reply to your letter of August 6, 2002, in which you request that we reconsider NY I82314 dated June 19, 2002, issued to you by the Director, National Commodity Specialist Division, with respect to the classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of certain LED (light emitting diode) display modules.

Facts:

The LED display modules were described in I82314 as follows:

> * * * the LED modules consist of a circuit board populated with electronic components and light emitting diodes (LED's). These modules are designed to be incorpo-

rated into electronic displays that are used for traffic management on highways and other roads. The displays provide information on traffic conditions.

In your letter of August 6, 2002, you state: "* * * the 'LED module' is a component (part) of the referenced traffic control signs * * * Our modules will be strictly used for the fabrication of electric signs used to control roadway traffic."

In your letter of May 13, 2002 to Customs, you state: "The LED modules will be incorporated into both permanently-mounted and mobile (portable) electronic displays that are used for vehicular traffic management (highways, freeways, etc.) * * * Please note that we only intend to import the LED characters, which form the programmable text portion of the display. The balance of the displays (cabinet, trailer, solar panels, and power supply) are either manufactured within the US or provided to our customers by other suppliers."

In response to our request for additional information, in your letter of September 26, 2002, you state:

> The LED display boards to be imported by Captus International are to be used solely for the manufacture of road traffic control displays. Some of these displays are to be mobile, in which LED boards are mounted on trailers placed at roadside; such trailers are moved from one road construction site to another as needed. Other traffic control displays are permanently mounted on frames at roadside and may stay in place for 10 years or more. At this time, Captus International plans to sell its LED boards to ADDCO, Inc., of St. Paul, Minnesota. ADDCO manufactures complete traffic control display assemblies.
>
> ADDCO sells its traffic control products to state departments of transportation (DOT's) and to contractors that build roads for DOT's. In all cases, the displays are used strictly for control of vehicular roadway traffic.
>
> There are many types of LED displays produced in the U.S.—not by ADDCO, but by other companies. Such displays include full color LED video screens for sports facilities and multi-color or one-color displays for commercial applications like shopping malls, banks, and casinos. It is theoretically possible to install our LED boards in one of the non-traffic control displays mentioned above. However, differences in the LED required for various applications prevent such activity from being practical.
>
> LED's in our traffic control boards have very narrow 15- to 45-degree viewing angles that are used specifically to manage narrow roadway corridors; narrow cones of light save energy and minimize display cost, and they are all that is needed to deliver important messages to the motoring public. 15- to 45-degree angles are too narrow to use for the video screen or commercial sign applications mentioned herein; these most commonly employ viewing angles of 70 degrees and higher.

In I82314 Customs classified the LED display modules in subheading 8531.90.90, HTSUS, which provides for: "Electric sound or visual signalling apparatus * * *: * * * Parts: * * * Other: * * * Other."

Issue:

What is the classification under the HTSUS of the LED display modules?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI's"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN's") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the EN's provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

The HTSUS provisions under consideration are as follows:

8530	Electrical signalling, safety or traffic control equipment for railways, streetcar lines, subways, roads, inland waterways, parking facilities, port installations or airfields (other than those of heading 8608); parts thereof:
8530.90.00	Parts

* * * * * * *

8531	Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof:
8531.90	Parts:
	Other:
8531.90.90	Other

Note 2 to Section XVI, HTSUS, provides in pertinent part as follows:

Subject to note 1 to this section, note 1 to chapter 84 and to note 1 to chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:

(a) Parts which are goods included in any of the headings of chapters 84 and 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8485, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;

(b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate * * *

EN 85.30 provides in pertinent part as follows:

This heading covers all electrical equipment used for controlling the traffic on railways, hovertrain systems, roads or inland waterways * * *

* * * * * * *

(B) **Equipment for roads, inland waterways or parking facilities.** This group includes:

(1) **Automatic level crossing signals,** e.g., winking lights, bells, illuminated stop signs.

Electrical equipment for operating gates or barriers is also covered by this heading.

(2) **Traffic lights.** These usually consist of a system of coloured lights installed at cross-roads, junctions, etc. They comprise the actual light installations, control equipment and means of operating the controls. The lights may be hand-operated (lights operated by a traffic policeman or, on certain pedestrian crossings, by the pedestrian) or automatic (lights operated on a time basis, and lights operated by the passage of vehicles, either by means of photoelectric cells or by contacts placed on the road).

(3) **Electrical traffic control equipment for port installations or airfields.**

[All emphasis in original.]

EN 85.31 provides in pertinent part as follows:

With the **exception** of signalling apparatus used on cycles or motor vehicles (**heading 85.12**) and that for traffic control on roads, railways, etc. (**heading 85.30**), this heading covers all electrical apparatus used for signalling purposes, whether using sound for the transmission of the signal (bells, buzzers, hooters, etc.) or using visual indication (lamps, flaps, illuminated numbers, etc.) and whether operated by hand (e.g., door bells) or automatically (e.g., burglar alarms).

* * * * * * *

This heading includes, *inter alia*:

(A) **Electric bells, buzzers, door chimes, etc.** * * *

(B) **Electric sound signalling apparatus, horns, sirens, etc.** * * *

(C) **Other electrical signalling apparatus** * * *

(D) **Indicator panels and the like.** These are used (e.g., in offices, hotels and factories) for calling personnel, indicating where a certain person or service is required, indicating whether a room is free or not * * *

(E) **Burglar alarms** * * *

(F) **Fire alarms** * * *

(G) **Electric vapour or gas alarms** * * *

(H) **Flame alarms** * * *

[All emphasis in original.]

The LED display modules are either provided for in heading 8530, HTSUS, or in heading 8531, HTSUS. The text of heading 8531, HTSUS, contains the language: "* * * other

than those of heading * * * 8530 * * *" Thus, if the LED display modules are described in heading 8530, HTSUS, they are classified therein and not in heading 8531, HTSUS. The text of heading 8530, HTSUS, includes: "* * * traffic control equipment for * * * roads." EN 85.30 provides that heading 8530 covers all electrical equipment used for controlling equipment on roads. You describe the LED display modules as: "* * * designed to be incorporated into electronic displays that are used for traffic management on highways and other roads."

Additional U.S. Rule of Interpretation 1(a) provides that the principal use is the controlling use with respect to tariff classifications controlled by use. Heading 8530, HTSUS, is a principal use provision which includes traffic control equipment. Based upon the facts submitted, we find that the subject LED display modules are solely or principally used as parts for traffic control equipment. See note 2(b) to Section XVI, HTSUS. Accordingly, we find that the LED display modules are provided for in heading 8530, HTSUS, and are classified in subheading 8530.90.00, HTSUS, as: "Electrical signalling, safety or traffic control equipment for railways, streetcar lines, subways, roads, inland waterways, parking facilities, port installations or airfields (other than those of heading 8608); parts thereof: * * * Parts."

Holding:

The LED display modules are classified in subheading 8530.90.00, HTSUS, as: "Electrical signalling, safety or traffic control equipment for railways, streetcar lines, subways, roads, inland waterways, parking facilities, port installations or airfields (other than those of heading 8608); parts thereof: * * * Parts".

Effect on Other Rulings:

NY I82314 is revoked.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF COTTON HEADWEAR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of two ruling letters and revocation of treatment relating to the tariff classification of cotton headwear.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two ruling letters relating to the tariff classification of cotton headwear under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Similarly, Customs is revoking any treatment previously accorded by it to substantially identical merchandise that is contrary to the position set forth in this notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 16, 2002.

FOR FURTHER INFORMATION CONTACT: Teresa Frazier, Textiles Branch (202) 572–8821.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility".** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In Headquarters Ruling Letter (HQ) HQ 085174, dated September 7, 1989, Customs classified a polycotton cap crown in subheading 6505.90.8060, HTSUSA, which essentially provided for hats and other headgear, made up of textile fabric, of man-made fibers. In HQ 087327, dated July 3, 1990, Customs classified a cotton hood lined with Orlon® pile material in subheading 6505.90.2500, HTSUSA, which essentially provided for hats and other headgear, of cotton textile fabric.

Pursuant to Customs obligations, a notice of proposed modification and revocation of these ruling letters and also HQ 084912, dated July 21, 1989, was published in the CUSTOMS BULLETIN of August 28, 2002, Volume 36, Number 35. We received one comment pertaining to HQ 084912, which identified that HQ 084912 was issued to modify the classification determination of HQ 082461, dated June 15, 1989. We have reviewed this comment as well as HQ 082461 and we are declining any proposed action to modify HQ 082461.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, Customs is revoking two ruling letters relating to the classification of cotton headwear. Although in this notice Customs is specifically referring to Headquarters Ruling Letters (HQ) 085174, dated September 7, 1989 and HQ 087327, dated July 3, 1990, this notice covers any rulings on such merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been found. Any

party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the issues subject to this notice, should have advised Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

Dated: September 27, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 27, 2002.

CLA–2 RR:TC:TE 963642 TMF
Category: Classification
Tariff No. 6505.90.2060

MR. JACK ALSUP, ESQ.
ALSUP & ASSOCIATES
P.O. Box 1251
Del Rio, TX 78841

Re: Revocation of HQ 085174; cotton/polyester cap and cap crown.

DEAR MR. ALSUP:

In Headquarters Ruling Letter (HQ) 085174, issued to you, September 7, 1989, Customs classified a cap and cap crown in subheadings 6505.90.8060 and 6505.90.2500, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), respectively. Subheading 6505.90.8060 essentially provided for hats and other headgear, made up of textile fabric, of man-made fibers. Subheading 6505.90.2500 essentially provided for hats and other headgear, of cotton textile fabric.

Upon review of HQ 085174, Customs has determined that this merchandise was erroneously classified. Therefore, this ruling revokes HQ 085174.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of this ruling was published on August 28, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 35. No comments were received in response to the notice.

Facts:

The merchandise at issue is a cap and a cap crown. The cap is composed of a 65 percent polyester/35 percent cotton woven fabric. It is a standard cap with a crown and bill and it is adjustable in the back. The words "The Classic" are embroidered on the front of the crown.

The crown is made of a 65 percent polyester/35 percent cotton woven fabric with an interior stiffener made of 100 percent cotton woven fabric. The importer states that the combined weight of the cotton in the outer shell and the interior stiffener outweighs the fabric of man-made fibers. The crown was to be made into a cap similar to the one at issue. The crown had the word "Titleist" embroidered on the front.

Issue:

What is the classification of the subject cap and cap crown within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Where goods cannot be classified solely on the basis of GRI 1 and if the headings or legal notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The cap is a type of headgear. *Merriam Webster's Collegiate Dictionary*, Tenth Edition (1999), defines headgear as a covering or protective device for the head. Rulings issued by Customs have based the definition of headgear on the *Random House Dictionary of the English Language*, Unabridged Edition (1983), which describes headgear as "any covering for the head, esp. a hat, cap, bonnet, etc." *See* HQ 087539, dated September 20, 1990.[1] We refer to the General Explanatory Note to Chapter 65, which offers an expansive definition of the term "headgear":

> With the **exception** of the articles listed below [*see footnote 2*] this Chapter covers hat-shapes, hat-forms, hat bodies and hoods, and hats and other headgear of all kinds, irrespective of the materials of which they are made and of their intended use (daily wear, theatre, disguise, protection, etc.).
>
> It also covers hair-nets of any material and certain specified fittings for headgear.
>
> The hats and other headgear of this Chapter may incorporate trimmings of various kinds and of any material, including trimmings made of the materials of Chapter 71.

Concerning the cap crown, it was noted in HQ 085174, that "In its unfinished state, it resembles a beanie." *Merriam Webster's Collegiate Dictionary*, defines "beanie" as a small round tight-fitting skullcap worn especially by schoolboys and college freshmen. Therefore, as the merchandise entirely covers the wearer's head, we consider the cap crown to be a type of headwear.

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[1] In HQ 087539, it is noted that "Certain articles (wigs, shawls, veils) which may be worn on the head are excluded from Chapter 65 either by the Chapter Notes or the Explanatory Notes, while other articles such as headphones are provided for in heading 8518, HTSUSA. Finally, we do not consider headbands, sweatbands and barrettes, which are worn on the head or in the hair in order to keep hair out of the eyes or off the forehead to be classifiable as headgear."

[2] The noted exceptions to Chapter 65 are as follows:

(a) Headgear for animals (heading 42.01).
(b) Shawls, scarves, mantillas, veils and the like (heading 61.17 or 62.14).
(c) Headgear showing signs of appreciable wear and presented in bulk, bales, sacks or similar bulk packings (heading 63.09).
(d) Wigs and the like (heading 67.04).
(e) Asbestos headgear (heading 68.12).
(f) Dolls' hats, other toy hats or carnival articles (Chapter 95).
(g) Various articles used as hat trimmings (buckles, clasps, badges, feathers, artificial flowers, etc.) when not incorporated in headgear (appropriate headings).

Further, the crown likely constitutes an incomplete or unfinished cap. Where merchandise is incomplete or unfinished, we look to GRI 2(a), which provides, in pertinent part:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article.

We find that the cap crown has the essential character of the complete cap. Both articles are composed of 65 percent polyester and 35 percent woven cotton with an interior stiffener of 100 percent cotton. We refer to Note 2(A) to Section XI which states, in part:

> Goods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over each other single textile material.

This note is applicable to the merchandise at issue by application of Additional U.S. Rule of Interpretation 1(d) which states that "the principles of section XI regarding mixtures of two or more textile materials shall apply to the classification of goods in any provision in which a textile material is named."

The outer surface of both the cap and crown is composed of a woven blend of 65 percent polyester and 35 percent cotton and each has an interior stiffener made of 100 percent cotton woven fabric. Customs properly determined that the combined weight of the cotton outershell and the interior stiffener weighs more than the polyester material pursuant to Section Note 2(A). The cap was therefore misclassified in subheading 6505.90.8060, HTSUSA because its cotton material outweighs the fabric of man-made fibers. As the cotton predominates by weight over the polyester material, the cap is classified within subheading 6505.90.2060, HTSUSA. Since the cap crown has the essential character of the complete or finished cap, it is classified in this same provision as headwear of cotton.

Holding:

HQ 085174, dated September 7, 1989, is hereby revoked.

The cap and cap crown are classified in subheading 6505.90.2060, HTSUSA, textile category 359, which provides for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: Certified hand-loomed and folklore products; and headwear of cotton, Other." The general column one duty rate is 7.6 percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,,
Commercial Rulings Divison.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 27, 2002.

CLA–2 RR:TC:TE 963643 TMF
Category: Classification
Tariff No. 6505.90.2060

YOLANDA LANDAU
MILTON SNEDEKER CORPORATION
105 Chambers Street
New York, NY 10007

Re: Revocation of HQ 087327; cotton hood with Orlon® pile lining.

DEAR MS. LANDAU:

In Headquarters Ruling Letter (HQ) 087327, issued to you, July 3, 1990, Customs classified a cotton hood with Orlon® pile lining in subheading 6505.90.2500, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), which essentially provided for hats and other headgear, of cotton textile fabric.

Upon review of HQ 087327, Customs has determined that the hood was erroneously classified. Therefore, this ruling revokes HQ 087327.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of this ruling was published on August 28, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 35. No comments were received in response to the notice.

Facts:

The article at issue is described in HQ 087327 as being a hood made of a 100 percent cotton outer material which was lined with an Orlon® pile material. (Orlon® is a trademark owned by Du Pont for acrylic staple fiber.) A knit fabric edge lined the top front opening of the hood, presumably for added warmth and wind blockage. A drawstring on the bottom edge of the hood provided an adjustable fit; a hook and loop tab secured the front flap closure, and two snaps were in place at the bottom rear of the hood. The descriptive literature included with the submission stated that the snaps were intended for attachment of style no. 332 jacket and style no. 543 overall manufactured by importer, either of which were available for separate purchase, but the hood at issue is imported separately.

Issue:

What is the classification of the cotton hood within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Where goods cannot be classified solely on the basis of GRI 1 and if the headings or legal notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Merriam Webster's Collegiate Dictionary, Tenth Edition (1999), defines headgear as a covering or protective device for the head. Rulings issued by Customs have based the definition of headgear on the *Random House Dictionary of the English Language,* Unabridged Edition (1983), which describes headgear as "any covering for the head, esp. a

hat, cap, bonnet, etc." *See* HQ 087539, dated September 20, 1990.[1] We refer to the General Explanatory Note to Chapter 65, which offers an expansive definition of the term "headgear":

> With the **exception** of the articles listed below [*see footnote 2*] this Chapter covers hat-shapes, hat-forms, hat bodies and hoods, and hats and other headgear of all kinds, irrespective of the materials of which they are made and of their intended use (daily wear, theatre, disguise, protection, etc.).
>
> It also covers hairnets of any material and certain specified fittings for headgear.
>
> The hats and other headgear of this Chapter may incorporate trimmings of various kinds and of any material, including trimmings made of the materials of Chapter 71.

EN (9) to heading 6505 indicates that the heading covers "Hoods," and that detachable hoods presented with the garments to which they belong are excluded from heading 6505 and classified with the garments according to their constituent materials. In the instant case as the hood is imported separately from the jacket and overalls, it is classified within heading 6505.

The outer surface of the hood is composed of 100 percent woven cotton fabric. Orlon® pile material lines the inside. Since the hood is composed of more than one material, we look to GRI 2(b), which, in pertinent part, states:

> [t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

GRI 3 provides:

> When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: [under GRI 3a and 3b]

GRI 3(a) directs that the headings are regarded as equally specific when each heading refers to part only of the materials contained in composite goods. In this case, the relevant headings are headings 5208, HTSUSA, which provides for woven cotton fabrics, and heading 5515 HTSUSA, which provides for other woven fabrics of synthetic staple fibers.

To determine under which provision the hood should be classified, we look to GRI 3(b), which states:

> Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

We must consider Explanatory Note IX to GRI 3(b), which states:

> For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, provided these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

The woven cotton and Orlon® fabrics are practically inseparable layers sewn together to form a hood. The interior Orlon® material provides warmth for the wearer's head and the exterior cotton is the more visible material. We find that the hood is a composite good.

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[1] In HQ 087539, it is noted that "Certain articles (wigs, shawls, veils) which may be worn on the head are excluded from Chapter 65 either by the Chapter Notes or the Explanatory Notes, while other articles such as headphones are provided for in heading 8518, HTSUSA. Finally, we do not consider headbands, sweatbands and barrettes, which are worn on the head or in the hair in order to keep hair out of the eyes or off the forehead to be classifiable as headgear."

[2] The noted exceptions to Chapter 65 are as follows:

(a) Headgear for animals (heading 42.01).
(b) Shawls, scarves, mantillas, veils and the like (heading 61.17 or 62.14).
(c) Headgear showing signs of appreciable wear and presented in bulk, bales, sacks or similar bulk packings (heading 63.09).
(d) Wigs and the like (heading 67.04).
(e) Asbestos headgear (heading 68.12).
(f) Dolls' hats, other toy hats or carnival articles (Chapter 95).
(g) Various articles used as hat trimmings (buckles, clasps, badges, feathers, artificial flowers, etc.) when not incorporated in headgear (appropriate headings)

As a composite good is classified by the material that imparts its essential character, we refer to Explanatory Note VIII to GRI 3(b), which provides the following guidance:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

In this case, the outer surface of cotton most significantly contributes to the overall appearance of the hood; it being far more visible to the eye than the Orlon® material. Further, the outer surface of cotton provides the shape of the hood as well as being capable of matching and attaching to the separately sold jacket and overalls. Therefore, we find that the outer surface of cotton imparts the hood's essential character.

In light of the above analysis, the hood is classified in subheading 6505.90.2060, HTSUSA, which provides, *eo nomine*, for headwear of cotton.

Holding:

HQ 087327, dated July 3, 1990, is hereby revoked.

The woven cotton hood is classified in subheading 6505.90.2060, HTSUSA, textile category 359, which provides for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: Certified hand-loomed and folklore products; and headwear of cotton, Other." The general column one duty rate is 7.6 percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

MODIFICATION OF TWO RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF SLEEP GARMENTS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of modification of two tariff classification ruling letters and treatment relating to the classification of certain sleepwear garments.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is modifying New York Ruling Letter (NY) I80792, issued April 25, 2002, relating to the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of a man's sleep pants, style 505–0503, and NY H80784, issued June 5, 2001, relating to the tariff classification under the HTSUSA, of a woman's two piece pajama set, style 733808. Similarly, Customs is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed modification was published on August 28, 2002, in the CUSTOMS BULLETIN. No comments were received in response to the notice of proposed action.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 16, 2002.

FOR FURTHER INFORMATION CONTACT: Shirley Greitzer, Textiles Branch: (202) 572–8823.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on August 28, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 25, proposing to modify New York decisions (NY) I80792, dated April 25, 2002, and NY H80784, dated June 5, 2001, pertaining to the tariff classification of a women's pajama and a men's sleep pant. No comments were received in response to this notice.

As stated in the proposed notice, the modification will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States Annotated. Any person involved with substantially identical merchandise should have advised Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling concerning the merchandise covered by this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importers or their agents for importations of merchandise, subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying NY I80792 and NY H80784 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 965633 and HQ 965561. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise.

In accordance with 19 U.S.C. 1625(c) these rulings will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: October 1, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 27, 2002.

CLA–2 RR:CR:TE 965633 SG
Category: Classification
Tariff No. 6207.91.3010

MS. DANA N. MOBLEY
CUSTOMS ANALYST
JCPENNEY PURCHASING CORPORATION
P.O. Box 10001
Dallas, TX 75301

Re: Modification of New York Ruling Letter (NY) I80792, dated April 25, 2002; Men's Sleep Pants from Indonesia.

DEAR MS. MOBLEY:

This letter is in response to your letter dated May 7, 2002, in which you requested reconsideration of New York Ruling Letter (NY) I80792, issued on April 25, 2002, in which Customs classified a men's garment, style 505–0503, in subheading 6203.42.4015, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for men's and boys' trousers, bib and brace overalls, breeches and shorts, of cotton, other, other, trousers and breeches, men's, other. Your letter along with a sample was forwarded to this office for our reply. We have reviewed the ruling and have found it to be partially in error. Therefore, this ruling modifies NY I80792.

Pursuant to section 625(c), Tariff Act of 1903, as amended (19 U.S.C. 1625(c)), notice of the proposed modification of NY I80792 was published on August 28, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 35.

Facts:

The merchandise at issue is described as a pair of men's 100 percent woven cotton sleepwear pant, JCPenney style number 505–0503. The garment has an elasticized waistband with a fully functional drawstring, and hemmed pant leg bottoms. The pants do not have pockets. It has a placketed fly approximately 8 inches in length. The fly is sewn shut for 2.5 inches from the top of the waistband and sewn shut from the bottom for 2 inches, leaving an unsecured fly opening of approximately 4½ inches.

It is claimed that although the open fly is smaller than some sleepwear pants, the wearer would not wear this garment outside without a closure. It is also claimed that the fact that the garment does not have pockets in which to carry keys or change, the wearer would likely not wear these outside of the home. It is claimed that the correct classification is under subheading 6207.91.3010, as men's sleepwear.

Issue:

Whether the merchandise, style 505–0503, was properly classified as an outerwear garment under heading 6203, HTSUS, or is a sleepwear garment under heading 6207, HTSUS?

Law and Analysis:

The General Rules of Interpretation (GRI's) govern classification of goods under the HTSUSA. GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order. The Harmonized Commodity Description and Coding System Explanatory Notes (ENs), although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989).

In order to determine whether or not the garment is sleepwear, Customs considers the factors discussed in two decisions of the Court of International Trade. In *Mast Industries, Inc. v United States*, 9 CIT 549, 552 (1985), aff'd 786 F.2d 1144 (CAFC, April 1, 1986), the court dealt with the classification of a garment claimed to be sleepwear and cited *Webster's Third New International Dictionary* which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court ruled that the garments at issue were designed, manufac-

tured, and marketed as nightwear and were chiefly used as nightwear. Similarly, in *St. Eve International, Inc. v. United States*, 11 CIT 224 (1987), the court ruled that the garments at issue were designed, manufactured, and advertised as sleepwear and were chiefly used as sleepwear.

In the recent case of *International Home Textile, Inc. v. United States*, 21 CIT 280, March 18, 1997, the Court of International Trade addressed the issue of whether certain men's garments were properly classified under the provision for cotton pants, shorts and tops or as sleepwear under the HTSUSA. The court held that in order to be classified as sleepwear, the loungewear items at issue must share that essential character of being for a "private activity", e.g., sleeping. The court also stated that garments classified as sleepwear would be inappropriate for use at "informal social occasions in and around the home, and for other individual, non-private activities in and around the house e.g., watching movies at home with guests, barbequing at a backyard gathering, doing outside home and yard maintenance work, washing the car, walking the dog, and the like."

In past rulings, Customs has stated that the crucial factor in the classification of a garment is the garment itself. As the court pointed out in *Mast*, "the merchandise itself may be strong evidence of use." *Mast* at 552, citing *United States v. Bruce Duncan Co.*, 50 CCPA 43, 46, C.A.D. 817 (1963). However, when presented with a garment which is somewhat ambiguous and not clearly recognizable as sleepwear or underwear or outerwear, Customs will consider other factors such as environment of sale, advertising and marketing, recognition in the trade of virtually identical merchandise, and documentation incidental to the purchase and sale of the merchandise, such as purchase orders, invoices, and other internal documentation. It should be noted that Customs considers these factors in totality and no single factor is determinative of classification as each of these factors viewed alone may be flawed. For instance, Customs recognizes that internal documentation and descriptions on invoices may be self-serving as was noted by the court in *Regaliti, Inc. v. United States*, 16 CIT 407 (May 21, 1992). We have long acknowledged that intimate apparel/sleepwear departments often sell a variety of merchandise besides intimate apparel, including garments intended to be worn as outerwear. See Headquarters Ruling Letter (HQ) 955341 of May 12, 1994.

In the instant case, a physical examination of the garment at issue reveals that the design is somewhat ambiguous due to both the styling features and the smaller than usual opening of the unsecured fly. It is our view that although the unsecured fly opening is somewhat smaller than those we have seen on comparable garments, the unsecured fly opening is large enough that is does not satisfy the conventional standards of modesty necessary on a garment that would be worn for the type of non-private activities named in *International Home Textiles, Inc.* An open fly is a feature whose defining characteristic is privateness or private activity, which is indicative of sleepwear and pajamas.

Although the subject garment could possibly be used for social activity inside the home, it is our view that because of the unsecured fly; it would be inappropriate to wear this garment while participating in any "* * * non-private activities in and around the house * * *.". It is our view that this use would be a fugitive use. In *Hampco Apparel, Inc. v. United States*, 12 CIT 92 (1988), the Court of International Trade stated: "The fact that a garment could have a fugitive use or uses does not take it out of the classification of its original and primary use. The primary design, construction, and function of an article will be determinative of classification, whether or not there is an incidental or subordinate function." In this case, because the submitted sample is capable of being used to lounge inside the home does not change what is its principal use and character as sleepwear. Thus, it is our determination that this garment has the essential character of privateness, i.e. of being used for the private activity of sleeping. The garment identified as style 505–0503 is therefore properly classifiable as a sleep garment, not outerwear. See HQ 963519, dated July 16, 2002, wherein we ruled that almost identical pants were classified as sleepwear.

Heading 6207, HTSUS, provides for, *inter alia*, pajamas and similar articles. Customs has consistently ruled that pajamas are generally two-piece garments worn for sleeping, one-piece garments such as these under consideration have been classified as other woven sleepwear.

Holding:

The instant merchandise is properly classified under the provision for "Men's or boys' singlets and other undershirts, underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similar articles: Other: Of cotton: Other: Sleepwear", in subheading

6207.91.3010, HTSUSA, and is dutiable under the general column one rate of 6.2 percent ad valorem. The textile category for this provision is 351.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quota (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.treas.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Effects on Other Rulings:

NY I80792 issued on April 25, 2002, is MODIFIED. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 27, 2002.

CLA–2 RR:CR:TE 965561 SG
Category: Classification
Tariff No. 6108.31.0010,
6106.20.2010, and 6104.63.2011

MS. JULIE GIMM, COMPLIANCE
BDP INTERNATIONAL INC.
2721 Walker Avenue, NW
Grand Rapids, MI 49504

Re: Modification of New York Ruling Letter (NY) H80784, dated June 5, 2001; Women's Pajama Set.

DEAR MS.GIMM:

This letter is in response to your letter dated April 1, 2002, in which you requested reconsideration of New York Ruling Letter (NY) H80784, issued on June 5, 2001, in which Customs classified women's two piece "pajama sets" in heading 6106, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for women's knitted blouses and shirts, and 6104, HTSUSA, which provides for women's knit trousers. We have reviewed that ruling and have found it to be partially in error. Therefore, this ruling modifies NY H80784.

Pursuant to section 625(c), Tariff Act of 1903, as amended (19 U.S.C. 1625(c)), notice of the proposed modification of NY H80784 was published on August 28, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 35.

Facts:

The merchandise identified as style 733808 is described as a woman's two-piece pajama set. It is constructed from 60% cotton and 40% polyester knit fabric. It consists of a shirt styled top and pull-on pants. The top features a banded neckline, full button front with one

upper left chest pocket, long sleeves with rib knit cuffs, and a hemmed bottom. The pull-on pants have an elasticized waistband and rib knit cuffs at the leg openings. The top is made mainly of two different types of fabric: thermal knit raglan sleeves; and a full front and back of jersey knit that has been brushed on the inside. The top has more than ten stitches per centimeter in both the horizontal and vertical directions. The pants are mainly constructed from thermal knit fabric.

The merchandise identified as style 733786 is described as a woman's two-piece pajama set. It is constructed from 100% polyester knit fabric heavily brushed on both sides. It consists of a pullover shirt styled top and coordinating pull-on pants. The top has a rounded neckline, a partial placket opening with a three-button closure, an upper left chest pocket, long sleeves with cuffs, and a hemmed bottom with three-inch side slits. The pants have an elasticized waistband and hemmed leg openings. The fabric has more than ten stitches per centimeter in both the horizontal and vertical directions.

You advise that the pajama sets will be sold in Meijer retail stores throughout the Midwest and that both styles will be sold exclusively under the "Simple Pleasures" brand name. You indicate that "Simple Pleasures" is a Meijer private label name for apparel sold exclusively in the Meijer Sleepwear Department. You attach samples of the "Simple Pleasures" labels from the Meijer corporate brands website. You indicate that these labels will be sewn into the garments themselves. You state that the garments are sold with the intention that they will be worn as sleepwear articles and not worn outside the privacy of one's home.

Issue:

Whether the merchandise was properly classified as outerwear garments under headings 6104 and 6106, HTSUS, or is pajamas sets under heading 6108, HTSUS?

Law and Analysis:

The General Rules of Interpretation (GRI's) govern classification of goods under the HTSUSA. GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order. The Harmonized Commodity Description and Coding System Explanatory Notes (ENs), although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989).

In determining the classification of garments submitted to be sleepwear, Customs usually considers the factors discussed in two court cases that addressed sleepwear. In *Mast Industries, Inc. v. United States*, 9 CIT 549, 552 (1985), aff'd 786 F.2d 144 (CAFC, 1986), the Court of International Trade considered the classification of a garment claimed to be sleepwear. The court cited several lexicographic sources, among them *Webster's Third New International Dictionary* which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court determined that the garment at issue therein was designed, manufactured, and used as nightwear and therefore was classifiable as nightwear. Similarly, in *St. Eve International, Inc. v. United States*, 11 CIT 224 (1987), the court ruled the garments at issue therein were manufactured, marketed and advertised as nightwear and were chiefly used as nightwear. Finally, in *Inner Secrets/Secretly Yours, Inc. v. United States*, 885 F. Supp. 248 (1995), the court was faced with the issue of whether women's boxer-style shorts were classifiable as "outerwear" under heading 6204, HTSUS, or as "underwear" under heading 6208, HTSUS. The court stated the following, in pertinent part:

> [P]laintiff's preferred classification is supported by evidence that the boxers in issue were designed to be worn as underwear and that such use is practical. In addition, plaintiff showed that the intimate apparel industry perceives and merchandises the boxers as underwear. While not dispositive, the manner in which plaintiff's garments are merchandised sheds light on what the industry perceives the merchandise to be. * * * Further, evidence was provided that plaintiff's merchandise is marketed as underwear. While advertisements also are not dispositive as to correct classification under the HTSUS, they are probative of the way that the importer viewed the merchandise and of the market the importer was trying to reach.

Furthermore, we bring your attention to *International Home Textile, Inc.*, 21 CIT 280, March 18, 1997, which classified garments as outerwear in headings 6103 and 6105, HTSUS. The court therein stated:

> Based upon a careful examination of the loungewear as well as the testimony of the various witnesses, the court finds that the loungewear items at issue do not share that essential character of privateness or private activity. As the parties have already stipulated, the loungewear is used primarily for lounging and not for sleeping. The court finds no basis in the exhibits, the witness testimony, or the loungewear's construction and design to find that it is inappropriate, at a minimum, for the loungewear to be worn at informal social occasions in and around the home, and for other individual, non-private activities in and around the house e.g., watching movies at home with guests, barbequing at a backyard gathering, doing outside home and yard maintenance work, washing the car, walking the dog, and the like. * * *

In your request for reconsideration you admitted that the sample garments can be worn for other than sleeping. You argue, however, that the controlling use is principal use, and that is as sleepwear. You state that the garments were designed, manufactured, marketed, and intended for use as sleepwear. In addition you claim that the print on the garments is clearly that of sleepwear and would not be worn out in public. Additionally, it is your belief that the following features are congruous with the garments classification as women's pajamas: the lack of pockets on the pants, the print used on the garments, and the loose construction and styling.

We have physically examined both of the two-piece garments at issue, and will address each separately.

Style 733786

We do not agree that the physical characteristics of the two-piece garment identified as style 733786, nor the manner in which it has been designed, marketed or sold are limited to sleepwear or intimate apparel. The physical characteristics of this style 733786 is such that it can easily be used as either sleepwear or as non-intimate apparel. The fleece fabric of which it is constructed is used for both types of garments. The appearance of this two-piece garment is, in fact, ambiguous. Although you claimed the sample was designed as sleepwear, no specific information concerning the design was submitted. Nothing about the design or appearance of the sample makes it unsuitable for use as sleepwear. However, the counter argument that nothing about the design or appearance makes the sample unsuitable for use as general apparel is equally true. In such circumstances, the principal use may be determined by the manner in which the garment is designed, marketed and sold.

In past rulings, Customs has stated that the crucial factor in the classification of a garment is the garment itself. As the court pointed out in *Mast*, "the merchandise itself may be strong evidence of use. "*Mast* at 552, citing *United States v. Bruce Duncan Co.*, 50 CCPA 43, 46, C.A.D. 817 (1963). However, when presented with a garment which is somewhat ambiguous and not clearly recognizable as sleepwear or underwear or outerwear, Customs will consider other factors such as environment of sale, advertising and marketing, recognition in the trade of virtually identical merchandise, and documentation incidental to the purchase and sale of the merchandise, such as purchase orders, invoices, and other internal documentation. It should be noted that Customs considers these factors in totality and no single factor is determinative of classification as each of these factors viewed alone may be flawed. For instance, Customs recognizes that internal documentation and descriptions on invoices may be self-serving as was noted by the court in *Regaliti, Inc. v. United States*, 16 CIT 407 (May 21, 1992). We have long acknowledged that intimate apparel/sleepwear departments often sell a variety of merchandise besides intimate apparel, including garments intended to be worn as outerwear. See HQ 955341 of May 12, 1994.

Customs does not find the fact that "Simple Pleasures" is a private label for apparel sold exclusively in the Meijer Sleepwear Department of particular significance. What we do find of importance is the 2-piece garment itself and the manner in which the garment will be presented to the public.

The sample will be imported with a label sewn into it saying "Simple Pleasures" but nothing else. There is a sample tag on the sample garment that describes it as a "Ladies Lounge Set". No other advertising or information was submitted. Based on the above, it is our view that the information submitted does not show that the style 733786 is merchandised to the consumer as a garment to be worn exclusively, or even principally, as sleepwear.

In your submission you concede that all the submitted garments may be used as outerwear (albeit inside the home). You however argue that this use would be a fugitive use. In *Hampco Apparel, Inc. v. United States*, 12 CIT 92 (1988), the Court of International Trade stated: "The fact that a garment could have a fugitive use or uses does not take it out of the classification of its original and primary use. The primary design, construction, and function of an article will be determinative of classification, whether or not there is an incidental or subordinate function." It is your stated view that just because the sample, style 733786, is capable of being used to lounge around the home does not change the claim that its principal use and character is as sleepwear.

As the court noted in *Mast*, at 551, "most consumers purchase and use a garment in the manner in which it is marketed." In our view, style 733786 is a multi-purpose garment and nothing provided to Customs suggests the garment is presented to consumers as designed or intended for wear while sleeping. Thus, Customs does not agree that this garment is presented to consumers as sleepwear garments.

Based on our examination of the sample identified as style 733786, we find that it is loungewear, i.e., loose, casual clothes that are worn in and around the home for comfort. Its fabric, construction and design are suitable for the type of non-private activities named in *International Home Textile, Inc.* Finally, although the garment may be worn to bed for sleeping, in our opinion its principal use is for "home comfort" and lounging. This garment can easily make the transition from inside the home (in a private setting) to outside the home (and a more social environment). In addition, the sample submitted is made of fabric heavy enough for outdoor use.

Taking into consideration all of the information before us, especially the two- piece garment (style 733786) itself, Customs believes this garment was properly classified as outerwear not as sleepwear.

Style 733808

Insofar as style 733808 is concerned, a physical examination of the sample at issue reveals that the design is such that it can easily be used as sleepwear or as intimate apparel. We note that the hangtag on the garment states that it is a 2-piece ladies' pajama. Thus, Customs agrees that this garment is presented to consumers as a sleepwear garment.

Although the subject garment could possibly be used for social activity inside the home, it is our view that one would not wear this garment while participating in any non-private activities such as those named in *International Home Textile, Inc.* It is our view that any such use would be a fugitive use. In this case, because the submitted sample is capable of being used to lounge inside the home does not change its principal use and character as sleepwear. Thus, it is our determination that this garment has the essential character of being used for the private activity of sleeping. The garment identified as style 733808 is therefore properly classifiable as a pajama set, not as loungewear.

Holding:

The sample identified as style 733808 is properly classified under the provision for "Women's or girls' slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles, knitted or crocheted: Nightdresses and pajamas: Of cotton: Women", in subheading 6108.31.0010, HTSUSA, and is dutiable under the general column one rate of 8.6 percent ad valorem. The textile category for this provision is 351.

The sample identified as style 733786 was properly classified in NY H80784 as outerwear separates. The top is classifiable under the provision for "Women's or girls' blouses and shirts, knitted or crocheted: Of man-made fibers: Other: Women's", in subheading 6106.20.2010, HTSUSA, and is dutiable under the 2002 general column one rate of 32.5 percent ad valorem. The textile category for this provision is 639. The bottom is classifiable under the provision for "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted: Trousers, bib and brace overalls, breeches and shorts: Of synthetic fibers: Other: Other: Trousers and breeches: Women's: Other", in subheading 6104.63.2011, and is dutiable under the 2002 general column one rate of 28.6 percent ad valorem. The textile category for this provision is 648.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we

suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quota (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.treas.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Effects on Other Rulings:

NY H80784 issued on June 5, 2001, is MODIFIED. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF MOTOR VEHICLE PLASTIC SEAT KNOB

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a ruling letter and treatment relating to the tariff classification of motor vehicle plastic seat knob.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of motor vehicle plastic seat knobs and revoking any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed action was published in the CUSTOMS BULLETIN on August 28, 2002. No comments were received in response to this notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 16, 2002.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, Commercial Rulings Division, (202) 572–8782.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on August 28, 2002, in the CUSTOMS BULLETIN, Vol. 36, No. 35, proposing to revoke NY G80939 dated August 18, 2000, pertaining to the tariff classification of motor vehicle plastic seat knobs. No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's failure to have advised the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this final notice.

In NY G80939, dated August 18, 2000, Customs found that the subject motor vehicle plastic seat knob was classified in subheading 9401.90.1080, HTSUS, as seats (other than those of heading 9402),

whether or not convertible into beds, and parts thereof, parts, of seats of a kind used for motor vehicles, other. Customs has reviewed the matter and determined that the correct classification of the motor vehicle plastic seat knobs are in subheading 3926.30.10, HTSUS, as other articles of plastics, fittings for furniture, coachwork or the like, handles and knobs.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY G80939 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 965482 (see the "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), these rulings will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: September 30, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 30, 2002.

CLA–2 RR:CR:GC 965482 KBR
Category: Classification
Tariff No. 3926.30.10

MR. ROBERT RESETAR
PORSCHE CARS NORTH AMERICA, INC.
980 Hammond Drive, Suite 1000
Atlanta, GA 30328

Re: Reconsideration of NY G80939; motor vehicle plastic seat knobs.

DEAR MR. RESETAR:

This is in reference to New York Ruling Letter (NY) G80939, issued to you by the Customs National Commodity Specialist Division, dated August 18, 2000, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a motor vehicle plastic seat knob from Germany. We have reviewed that ruling and determined that the classification set forth is in error.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published on August 28, 2002, in Vol. 36, No. 35 of the CUSTOMS BULLETIN, proposing to revoke NY G80939. No comments were received in response to this notice. This ruling revokes NY G80939 by providing the correct classification for the motor vehicle plastic seat knob.

Facts:

NY G80939 concerned a motor vehicle plastic seat knob made of injection molded plastic. The knob attaches onto a lever that connects to a mechanical cable that activates a

latch, which holds the seat backrest in place. When moved upward, the lever/cable disengages the backrest latch and allows the backrest to be moved forward for access to the back seat of the motor vehicle. The knob is dedicated for and can only be used on the motor vehicle seat. The ruling classified the seat knob in subheading 9401.90.1080, HTSUS, which provides for seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof, parts, of seats of a kind used for motor vehicles, other.

Issue:

What is the classification of the motor vehicle plastic seat knob?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, Customs looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUS. It is Customs practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.30	Fittings for furniture, coachwork or the like:
3926.30.10	Handles and knobs
8302	Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts thereof:
8302.30	Other mountings, fittings and similar articles suitable for motor vehicles; and parts thereof:
9401	Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof:
9401.90	Parts:
9401.90.10	Of seats of a kind used for motor vehicles

NY G80939 classified the motor vehicle seat knob in subheading 9401.90.10, HTSUS. However, Chapter 94 Note 1(d), HTSUS, states that the chapter does not cover "[p]arts of general use as defined in note 2 to section XV, of base metal (section XV), or similar goods of plastics (chapter 39), or safes of heading 8303". Included within this definition of "parts of general use" are articles within heading 8302, HTSUS. The ENs for heading 8302 at paragraph (E)(5) state that this heading includes as mountings and fittings and similar articles suitable for furniture, "handles and *knobs*" (emphasis added). The ENs at (C) specifically states that articles within this heading include parts for automobiles, and in its preliminary paragraph also states that "[g]oods within such general classes remain in this heading even if they are designed for particular uses (e.g., door handles or hinges for automobiles)." *See* HQ 962183 (June 2, 1999), HQ 962046 January 13, 1999).

NY C89088 (August 8, 1998), found that a plastic knob for an automobile sunroof was a "parts of general use" and therefore the exclusionary note applied. The plastic knob was found to be a similar good to that included in heading 8302, HTSUS, but because it was plastic, the knob should therefore be classified in subheading 3926.30.10, HTSUS. *See also* NY H88198 (February 13, 2002) (involving a lumbar adjuster knob).

Therefore, Customs finds that Note 1(d) excludes the instant plastic motor vehicle seat knob from classification in Chapter 94. The classification in NY G80939 is, therefore, incorrect. Customs finds that the correct classification for the plastic motor vehicle seat knob is in subheading 3926.30.10, HTSUS, as other articles of plastics and articles of other materials of heading 3901 to 3914, fittings for furniture, coachwork and the like, handles and knobs.

Holding:

In accordance with the above discussion, the correct classification for the plastic motor vehicle seat knob is in subheading 3926.30.10, HTSUS, as other articles of plastics and articles of other materials of heading 3901 to 3914, fittings for furniture, coachwork and the like, handles and knobs.

Effect on Other Rulings:

NY G80939 dated October 9, 1997, is REVOKED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF SPOONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letters relating to the tariff classification of spoons.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking three ruling letters pertaining to the tariff classification of spoons. Customs is also revoking any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed action was published in the CUSTOMS BULLETIN on August 28, 2002. No comments were received in response to the notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 16, 2002.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Regulations Branch, (202) 572–8764.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter Title VI) became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts

are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify, and value imported merchandise, and to provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on August 28, 2002, in the CUSTOMS BULLETIN, Vol. 36, No. 35, proposing to revoke New York Ruling Letter (NY) D86420, dated January 7, 1999, NY E86257, dated September 9, 1999, and NY E88103, dated December 20, 1999. No comments were received during the comment period.

As stated in the proposed notice, the revocation will also cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions that is contrary to the position set forth in this notice. This treatment may, among other reasons, be the result of the importer's reliance on a ruling letter issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

In NY D86420 and NY E86257, Customs classified certain spoons made of base metal with plastic or rubber handles in subheading 8215.99.4500, HTSUS, which provides for: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen tableware; * * *: Other: Other: Spoons and ladles: Other. In NY

E88103, a reconsideration of NY E86257, Customs classified the spoons in subheading 8215.99.5000, HTSUS, which provides for: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen tableware; * * *: Other: Other: Other (including parts). Since their issuance, Customs has reconsidered each ruling and determined that the spoons are classifiable under subheading 8215.99.4060, HTSUS, which provides for: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; * * *: Other: Other: Spoons and ladles: With base metal (except stainless steel) or nonmetal handles * * * Other.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking the three ruling letters pertaining to the classification of spoons and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Letters 965794 (Attachment A) and 965032 (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), these rulings will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: September 30, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 30, 2002.

CLA–2 RR:CR:GC 965794 bc
Category: Classification
Tariff No. 8215.99.4060

ROBERT L. GARDENIER
M.E. DEY & CO.
5007 South Howell Avenue
P.O. Box 37165
Milwaukee, WI 53237–0165

Re: Spoons; NY D86420 revoked.

DEAR MR. GARDENIER:

This concerns NY D86420, issued to you on January 7, 1999, on behalf of Smith & Nephew Inc. Rehab Div., by the Director, Customs National Commodity Specialist Division, New York, regarding the classification of certain spoons under the Harmonized Tariff Schedule of the United States (HTSUS).

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agree-

ment Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), a notice was published on August 28, 2002, in the CUSTOMS BULLETIN, Vol. 36, No. 35, proposing to revoke NY D86420. No comments were received during the comment period.

As further explained below, in NY D86420, Customs classified the subject spoons under subheading 8215.99.4500, HTSUS, as spoons with handles made of something other than stainless steel, other base metals, or nonmetals. Customs has had the chance to review that ruling and finds it to be inconsistent with the HTSUS requirements for classification of such merchandise. It is now Customs position that the spoons at issue are properly classifiable under subheading 8215.99.4060, HTSUS, as spoons with nonmetal handles. For the reasons stated below, this ruling revokes NY D86420.

Facts:

In NY D86420, Customs described the spoons as made of base metal with large rubber grip handles, specially designed for people with physical disabilities or blindness. The samples submitted were for two styles: Style A703–205, the "Supergrip Bendable Utensil" and Style A703–200, the "Supergrip Utensil, Teaspoon." Based on this description, Customs classified the spoons under subheading 8215.99.4500, HTSUS, which provides for: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; and base metal parts thereof: Other: Other: Spoons and ladles: Other.

Issue:

Whether the spoons are classifiable under subheading 8215.99.4500, HTSUS, or subheading 8215.99.4060, HTSUS?

Law and Analysis:

Classification of goods under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relevant Section or Chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. The ENs, neither legally binding nor dispositive, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of their proper interpretation. See Treasury Decision 89–80.

The relevant HTSUS provisions under consideration are as follows:

8215		Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; and base metal parts thereof:
*	* * * * * * *	
8215.99		Other:
*	* * * * * * *	
		Spoons and ladles:
		With stainless steel handles:
8215.99.30		Spoons valued under 25 cents each
8215.99.35		Other
8215.99.40		With base metal (except stainless steel) or nonmetal handles
8215.99.45		Other
8215.99.50		Other (including parts)

Spoons (not plated with precious metal) are classifiable at the eight-digit level according to the composition of the handles. (Individual spoons, forks, etc., that are plated with precious metal are classifiable under subheading 8215.91, HTSUS.) Spoons with stainless steel handles are classifiable, depending on their value, under subheadings 8215.99.30 and 8215.99.35, HTSUS. Spoons with handles of base metal (except stainless steel) or nonmetal are classifiable under subheading 8215.99.40, HTSUS. Spoons with handles consisting of something other than stainless steel, other base metals, or non-metal, such as precious metal, are classifiable in subheading 8215.99.45, HTSUS. As the spoons at issue

have rubber handles and rubber is a nonmetal, they are not classifiable at the eight-digit level as spoons with handles of other than stainless steel, other base metals, or nonmetal in subheading 8215.99.45, HTSUS. Instead, they are classifiable as spoons with nonmetal handles (of rubber) in subheading 8215.99.40, HTSUS.

Holding:

NY D86420, dated January 7, 1999, is hereby REVOKED.

The base metal spoons with rubber handles are classifiable as spoons, other than tablespoons, with nonmetal handles in subheading 8215.99.4060, HTSUS.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 30, 2002.

CLA–2 RR:CR:GC 965032 bc
Category: Classification
Tariff No. 8215.99.4060

PHILIP KWOK
LIFETIME HOAN CORPORATION
One Merrick Avenue
Westbury, NY 11590–6601

Re: Spoons; NY E86257 and NY E88103 revoked.

DEAR MR. KWOK:

This concerns NY E86257, dated September 9, 1999, and NY E88103, dated December 20, 1999, both issued to you by the Director, Customs National Commodity Specialist Division, New York, regarding the classification of certain spoons under the Harmonized Tariff Schedule of the United States (HTSUS).

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), a notice was published on August 28, 2002, in the CUSTOMS BULLETIN, Vol. 36, No. 35, proposing to revoke NY E86257 and NY E88103. No comments were received during the comment period.

In NY E86257, Customs classified two types of spoons under subheading 8215.99.4500, HTSUS. In NY E88103, Customs reclassified the same spoons under subheading 8215.99.5000, HTSUS. The latter ruling was issued as a reconsideration of the former ruling. (Customs notes a typographical error in NY E88103 that shows subheading 8215.99.4060, HTSUS, in the "Tariff No." line of the header.) Customs has had the chance to review these rulings and finds them to be inconsistent with the HTSUS requirements for classification of such merchandise. It is now Customs position that the spoons at issue are properly classifiable under subheading 8215.99.4060, HTSUS. For the reasons stated below, this ruling revokes NY E86257 and NY E88103.

Facts:

In NY E86257 and NY E88103, Customs described the two types of spoons there classified as a slotted spoon (Item #83364) and a basting spoon (Item #83715), both made of stainless steel with plastic handles. The handles also have stainless steel sides and rubber non-slip grips (attached to the sides of the handle). In NY E86257, Customs classified both spoons in subheading 8215.99.4500, HTSUS, as: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; and base metal parts thereof: Other: Other: Spoons and ladles: Other. In NY E88103, Customs

reclassified both spoons in subheading 8215.99.5000, HTSUS, as: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; and base metal parts thereof: Other: Other: Other (including parts).

Customs, as explained below, now believes that the spoons are classifiable under subheading 8215.99.4060, HTSUS, as spoons (not plated with precious metal), other than tablespoons, with nonmetal handles. (Individual spoons, forks, etc, that are plated with precious metal are classifiable under subheading 8215.91, HTSUS.)

Issue:

Whether the spoons are classifiable under subheading 8215.99.3000, 8215.99.3500, 8215.99.4060, 8215.99.4500, HTSUS, or 8215.99.5000, HTSUS?

Law and Analysis:

Classification of goods under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relevant Section or Chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See Treasury Decision 89–80.

The relevant HTSUS provisions under consideration are as follows:

8215	Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; and base metal parts thereof:
* * *	* * * * * *
8215.99	Other:
* * *	* * * * * *
	Spoons and ladles:
	With stainless steel handles:
8215.99.30	Spoons valued under 25 cents each
8215.99.35	Other
8215.99.40	With base metal (except stainless steel) or nonmetal handles
8215.99.45	Other
8215.99.50	Other (including parts)

Initially, classification in subheading 8215.99.5000, HTSUS, is readily disposed of by recognition of the fact that the spoons at issue are classifiable only under a subheading that provides for spoons, i.e., at the eight-digit level, 8215.99.30, 8215.99.35, 8215.99.40, or 8215.99.45, HTSUS. An article classified in subheading 8215.99.5000, HTSUS, must be something other than a spoon or a ladle, such as a butter-knife, sugar tong, or similar kitchen or tableware. Thus, we conclude that the spoons are not classifiable in subheading 8215.99.5000, HTSUS.

Determining which of the remaining subheadings provides for the classification of the spoons requires an examination of the composition of the spoon handles. Spoons with handles of stainless steel are classifiable, depending on their value, in subheadings 8215.99.30 or 8215.99.35, HTSUS.

Spoons with handles of base metal (except stainless steel) or nonmetal are classifiable under subheading 8215.99.40, HTSUS. Spoons with handles consisting of something other than stainless steel, other base metals, or nonmetal, such as precious metal, are classifiable in subheading 8215.99.45, HTSUS. As the handles of the spoons consist of plastic, stainless steel, and rubber, application of GRI 3, applicable at the subheading level through application of GRI 6, is called for.

Before applying GRI 3, classification of the spoons under subheading 8215.99.30, HTSUS, can be disposed of without further consideration. The subheading provides for spoons with stainless steel handles valued under 25 cents each, and the spoons at issue are valued in excess of 25 cents each. This fact eliminates the subheading as a classification

possibility and leaves subheading 8215.99.35, HTSUS, as the only possibility for classifying the spoons as spoons with stainless steel handles. Also, classification in subheading 8215.99.4500, HTSUS, can be disposed of without further consideration by recognition of the fact that this subheading provides for classification of spoons with handles made of materials other than stainless steel, other base metals, or nonmetals. As the handles of the spoons at issue consist of plastic (nonmetal), stainless steel, and rubber (nonmetal), the spoons cannot be classified in subheading 8215.99.4500, HTSUS. This leaves only subheadings 8215.99.35 and 8215.99.40, HTSUS, as classification possibilites.

Under GRI 3(a), in pertinent part, and GRI 6, classification is appropriate in the subheading that provides the most specific description of the article or component under consideration. In this case, the description referred to is the composition of the spoon handles which determines classification of the spoons at the eight-digit level. However, when two or more subheadings each refer to part only of the materials or substances contained in mixed or composite goods, those subheadings are to be regarded as equally specific, and consideration of the article or component for classification purposes will proceed under GRI 3(b). As subheading 8215.99.35, HTSUS, refers to stainless steel handles and subheading 8215.99.40, HTSUS, refers to handles of base metal (except stainless steel) and nonmetal (here, the plastic and rubber), these subheadings are regarded as equally specific, and classification of the spoons will be considered under GRI 3(b).

Under GRI 3(b), as applied to the facts of this case, classification is determined by ascertaining which of the materials of the spoon handles, the plastic, stainless steel, or rubber, imparts to the spoon handle its essential character. Classification in subheading 8215.99.35, HTSUS, will follow if the essential character of the handles is imparted by the stainless steel component. Classification in subheading 8215.99.40, HTSUS, will follow if the essential character of the handles is imparted by the plastic or the rubber component.

Based on the description of the spoons provided by Lifetime Hoan Corporation, we find that the plastic and rubber materials are the primary materials of the spoon handles, as the plastic represents the essentail form and substance of the handle and the rubber provides the important non-slip gripping feature. Thus, we conclude that the essential character of the handles is not imparted by the stainless steel component. As between the plastic and rubber components of the handles, both nonmetal materials, we submit that an essential character determination is not necessary, since classification will be the same under subheading 8215.99.40, HTSUS, regardless of which of these two components is said to impart essential character.

Holding:

NY E86257, dated September 9, 1999, and NY E88103, dated December 20, 1999, are hereby REVOKED.

Based on the foregoing analysis, the spoons with handles of plastic, rubber, and stainless steel are classifiable as spoons, other than tablespoons, with nonmetal handles in subheading 8215.99.4060, HTSUS.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF A FORTIFIED OAT CEREAL PRODUCT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of classification ruling letter relating to the tariff classification of a fortified oat cereal product.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of a fortified oat cereal product. Customs is also revoking any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed action was published in the CUSTOMS BULLETIN on August 28, 2002. The one comment that was received in response to the notice was in favor of the proposed revocation.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 16, 2002.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Regulations Branch, (202) 572–8764.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter Title VI) became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify, and value imported merchandise, and to provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on August 28, 2002, in the CUSTOMS BULLETIN, Vol. 36, No. 35, proposing to revoke New York Ruling Letter (NY) H81626, dated May 30, 2001. The one comment that was received during the comment period was in favor of the proposed revocation.

As stated in the proposed notice, the revocation will also cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions that is contrary to the position set forth in this notice. This treatment may, among other reasons, be the result of the importer's reliance on a ruling letter issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

In NY H81626, Customs classified a product referred to as a cereal product from Ireland in subheading 1904.90.0040, HTSUS, which provides for prepared foods obtained by the swelling or roasting of cereals or cereal products (for example, cornflakes); cereals (other than corn (maize)) in grain form or in the form of flakes or other worked grains (except flour, groats, and meal), pre-cooked or otherwise prepared, not elsewhere specified or included: Other: Other. Since the issuance of that ruling, Customs has reconsidered the ruling and determined that the fortified oat cereal product is classifiable under subheading 1104.22.0000, HTSUS, as otherwise worked oat cereal grains.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY H81626 and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Letter 965522 (see "Attachment"). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: September 30, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 30, 2002.

CLA–2 RR:CR:GC 965522 bc
Category: Classification
Tariff No. 1104.22.0000

JEFFREY S. LEVIN, ESQ.
HARRIS ELLSWORTH & LEVIN
2600 Virginia Ave., N.W., Suite 1113
Washington, DC 20037

Re: McCann's Fortified Oats; NY H81626 revoked.

DEAR MR. LEVIN:

This concerns NY H81626, dated May 30, 2001, issued to All-Ways Forwarding Int'l Inc. (All-Ways Forwarding) on behalf of World Finer Foods by the Director, Customs National Commodity Specialist Division, New York, regarding the classification of a fortified oat cereal product (McCann's) under the Harmonized Tariff Schedule of the United States (HTSUS).

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), a notice was published on August 28, 2002, in the CUSTOMS BULLETIN, Vol. 36, No. 35, proposing to revoke NY H81626. The one comment received during the comment period was in favor of the proposed revocation.

As further explained below, in NY H81626, Customs classified the fortified oat cereal product at issue under subheading 1904.90.0040, HTSUS, as a pre-cooked or otherwise prepared cereal (other than corn) in grain form or in the form of other worked grains. In response to your letter of March 20, 2002, requesting reconsideration of NY H81626, we reviewed that ruling and find it to be inconsistent with the HTSUS requirements for classification of such merchandise. It is now Customs position that the fortified oat cereal product at issue is properly classifiable under subheading 1104.22.0000, HTSUS, as otherwise worked oat cereal grains. For the reasons stated below, this ruling revokes NY H81626.

Facts:

In NY H81626, issued May 30, 2001, Customs described the fortified oat cereal product there classified as follows: "McCann's Fortified Oats is a food product composed of precooked, vitamin-fortified oat groats, packed for retail sale." Based on this description, Customs classified the cereal product under subheading 1904.90.0040, HTSUS, as cereals (other than corn (maize)) in grain form or in the form of flakes or other worked grains (except flour, groats, and meal), pre-cooked or otherwise prepared, not elsewhere specified or included: Other: Other. The classification ruling was issued on May 30, 2001.

In your March 20, 2002, letter, you requested reconsideration of the ruling and contended that the cereal product should be classified under subheading 1104.22.0000, HTSUS,

as cereal grains otherwise worked (for example, hulled, rolled, flaked, pearled, sliced, or kibbled), except rice of heading 1006; * * *; Other worked grains (for example, hulled, pearled, sliced, or kibbled): Of oats. You set forth a description of the product and the production process with particular emphasis on the question of whether the product was subject to a pre-cooking process. You contend that the product is not pre-cooked or otherwise prepared.

Issue:

Is McCann's Fortified Oats classified as a pre-cooked or otherwise prepared cereal in grain form under heading 1904, HTSUS, or as an otherwise worked cereal grain of oats under heading 1104, HTSUS?

Law and Analysis:

Classification of goods under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relevant Section or Chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See Treasury Decision 89–80.

The HTSUS provisions under consideration are as follows:

1104	Cereal grains otherwise worked (for example, hulled, rolled, flaked, pearled, sliced, or kibbled), except rice of heading 1006; germ of cereals, whole, rolled, flaked, or ground:
1904	Prepared foods obtained by the swelling or roasting of cereals or cereal products (for example, cornflakes); cereals (other than corn (maize)) in grain form or in the form of flakes or other worked grains (except flour and meal), pre-cooked or otherwise prepared, not elsewhere specified or included:

The Customs ruling that classified the oat cereal product under heading 1904, HTSUS, was based in significant part on Customs understanding that the product had been pre-cooked during production. A description of the production process submitted by All-Ways Forwarding included two stages where heat was applied to the product. During what is designated the kilning stage, early in the process, the oats are steamed for 10 minutes at 100 degrees Celcius, kilned for 2 hours at 95–105 degrees Celcius, and cooled for 30 minutes at 25 degrees Celcius. This stage of production is designed to toast the oats for flavoring purposes and to inactivate an enzyme present in the oats that can cause rancidity. Later in the process, the oats, which are referred to as cut groats at this stage, are subjected to steam for 10 minutes to bind the vitamin mix to the cut groats and then conditioned for 40 minutes at 100 degrees Celcius. This stage of production also ensures completion of the enzyme deactivation process. In initially classifying the product, Customs believed that this second heating process constituted a pre-cooking process. Essential to this belief was the fact that a relatively short cooking time (6–7 minutes as compared to 20–30 minutes for similar product) is required to prepare the finished product for consumption. Thus, based on the conclusion that pre-cooking was involved, Customs classified the cereal product as "pre-cooked or otherwise prepared" under heading 1904, HTSUS.

In reconsidering this case, Customs has reviewed your arguments, conducted additional research, and consulted an expert in the field of oat processing. As a result, Customs acknowledges that its understanding that the product was pre-cooked, upon which NY H81626 was based, is not accurate. For the reasons set forth below, Customs now understands that the product classified in NY H81626 is not pre-cooked or otherwise prepared.

Regarding pre-cooking, Customs now believes that the reduced cooking time for the finished product at issue is primarily due to three factors. The first is the fact that the product is cut more finely than other products of this kind that require more time for cooking. (Kibbling is a grinding process that produces the finished oat pieces, but they are referred to as cut pieces.) The size of the pieces affects cooking time: the smaller the pieces, the quicker the cooking time. The second is that during the heating and conditioning process

that binds the vitamin mixture to the product, the moisture content of the cut pieces is reduced, resulting in a product that is more absorbent than most similar products. The ability of the oat pieces to absorb water affects cooking time: the more absorbent the pieces, the quicker the cooking time. The third is the fact that the product is cooked by adding it directly to boiling water, resulting in more rapid hydration of the pieces and, again, a shorter cooking time.

Thus, Customs now concludes that while the second heating process involved in production of the product inevitably has some effect on cooking time, it is not a pre-cooking process. Its purpose is to bind the vitamin mixture to the oat pieces, and the shortened cooking time is predominantly the result of other factors.

Regarding the question of whether the product is "otherwise prepared," Chapter Note 4 of Chapter 19, HTSUS, provides that the expression "otherwise prepared" means prepared or processed to an extent beyond that provided for in the headings of or notes to chapter 10 or 11." The relevant preparations and processes of Chapter 11 are hulling, rolling, flaking, pearling, slicing, kibbling, and grinding. As the product at issue has undergone only the processes of hulling and kibbling (along with some other routine, incidental procedures, such as cleaning and sorting), both permitted under Chapter 11, and has not been subject to advanced processes that would constitute preparation beyond that which is permitted under Chapter 11, HTSUS, Customs concludes that the product is not otherwise prepared within the meaning of Chapter 19, HTSUS.

Holding:

NY H81626, dated May 30, 2001, is hereby REVOKED.

Based on the foregoing findings that McCann's Fortified Oats consists of cereal grains of oats that have been hulled and kibbled, as permitted under Chapter 11, HTSUS, but not pre-cooked or otherwise prepared which would require its classification under Chapter 19, HTSUS, such product is classifiable under Chapter 11, HTSUS, specifically in subheading 1104.22.0000, HTSUS, as: Cereal grains otherwise worked (for example, hulled, rolled, flaked, pearled, sliced, or kibbled), except rice of heading 1006; * * *: Other worked grains (for example, hulled, pearled, sliced, or kibbled): Of oats.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 02–116)

NIPPON STEEL CORP, NKK CORP, KAWASAKI STEEL CORP, AND TOYO KOHAN CO., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND WEIRTON STEEL CORP., DEFENDANT-INTERVENOR

Court No. 00–09–00479

[Motion to amend judgment denied.]

(Dated September 26, 2002)

Willkie Farr & Gallagher (James P. Durling, Daniel L. Porter, and *Robert E. DeFrancesco)* for plaintiffs.

Lyn M. Schlitt, Office of General Counsel, *James M. Lyons,* Deputy General Counsel, U.S. International Trade Commission *(Laurent M. deWinter),* for defendant.

Schagrin Associates (Roger B. Schagrin), for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court on defendant-intervenor's motion for reconsideration of the court's opinion entered herein, *Nippon Steel Corp. v. United States,* No. 00–09–00479, Slip Op. 02–86 (Ct. Int'l Trade Aug. 9, 2002), which the court finds to be a motion pursuant to USCIT R. 59(e) to amend the final judgment entered herein.

Defendant-intervenor Weirton Steel Corporation does not by its motion challenge the court's determination that the affirmative material injury decision of the International Trade Commission ("ITC") was erroneous, but rather it asserts that the court should have remanded this matter to the ITC for a determination of threat of material injury by reason of imports of tinmilled steel sheet from Japan. The ITC does not join in this motion.

As Weirton acknowledges, the court did not overlook this possibility. It specifically found that threat of material injury was not raised as an alternative basis for an affirmative injury finding and declined to remand for such an investigation. *Nippon* at 44 n.32.

This is also not a case of simple failure to allege alternative viable claims on appeal. This was not a viable threat case. There seems to be no

dispute as to the injured state of the domestic industry. The issue was causation of that injury by reason of Japanese imports. A threat case involves a very different mode of analysis and in its post-hearing brief before the ITC, Weirton did not present a threat case. *See Defendant-Intervenor Post-Hearing Br.* (July 7, 2000), C.R. Doc. 06–630. Weirton cannot now ask to litigate a cause it did not fully pursue before the agency or this court.

Weirton's motion is denied.

(Slip Op. 02– 117)

HYNIX SEMICONDUCTOR, INC., HYNIX SEMICONDUCTOR AMERICA, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR

Court No. 01–00988

[Defendant's Motion to Strike is denied.]

(Dated September 30, 2002)

Willkie Farr & Gallagher (James P. Durling, Daniel Porter, Robert E. DeFrancesco), Washington, D.C., for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Mark L. Josephs,* Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Patrick V. Gallagher, Jr.,* Senior Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

Hale and Dorr LLP (Gilbert B. Kaplan), Washington, D.C., for Defendant-Intervenor.

OPINION

CARMAN, *Chief Judge:* Pursuant to CIT Rules 12(f), 56.2(c), 7(d), and 81(m) of this Court, Defendant moves to strike Exhibit 1 to Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Judgment Upon Agency Record ("Plaintiffs' Brief") and the portion of Plaintiffs' Brief discussing the exhibit. This Court denies Defendant's Motion to Strike and will treat Exhibit 1 and the relevant section of Plaintiffs' Brief solely as devices used for the limited purpose of advancing a legal argument. Moreover, this Court treats Exhibit 1 as providing no additional evidence to the Agency Record.

BACKGROUND

Defendant has filed a motion to strike Exhibit 1 to Plaintiffs' Brief, which is an excerpt from the transcript of an oral argument in *Hyundai Electronics Co. Ltd.v. United States,* No. 01–00027 (Ct. Int'l Trade filed Jan. 1, 2000). Defendant further asks that the corresponding section of Plaintiffs' Brief discussing the exhibit be stricken as well. Both parties

agree Exhibit 1 is not part of the Agency Record subject to judicial review in this case. Nevertheless, Defendant argues that Plaintiffs are attempting to supplement the agency record by introducing Exhibit 1 in these proceedings. Plaintiffs have filed a motion in opposition to the charge of attempting to supplement the Agency Record, arguing that Exhibit 1 was submitted for "legal argumentation" only.

DISCUSSION

Motions to strike are generally "disfavored" or "extraordinary" remedies, which "should be granted only in cases where there has been a flagrant disregard for the Rules of this Court." *Jimlar Corp. v. United States,* 647 F. Supp. 932, 934 (Ct. Int'l Trade 1986); *see also, Beker Indus. v. United States,* 585 F. Supp. 663, 665 (Ct. Int'l Trade 1984). In this case, Defendant has charged that Plaintiffs attempted to impermissibly supplement the agency record by submitting an exhibit to Plaintiffs' Brief which is not part of the record as defined by statute. Defendant argues that consideration of Exhibit 1 by this Court would constitute an improper expansion of the scope of judicial review.

In this case, judicial review consists of determining whether the Defendant's final results in the underlying administrative review are "unsupported by substantial evidence on the record, or are otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B)(I) (2000). "Record for Review" is defined in 19 U.S.C. § 1516a(b)(2)(A). This Court has interpreted § 1516a(b)(2)(A) to mean that the "scope of the record for purposes of judicial review is based upon information which was 'before the relevant decision maker' and was presented and considered 'at the time the decision was rendered.'" *Beker Indus. Corp. v. United States,* 7 C.I.T. 313, 315 (1984) (quoting S. Rep. No. 96–249, at 247 (1979)). Absent special circumstances, this Court will not accept new information or evidence to supplement the administrative record. *See, e.g., F. LLi De Cecco Di Filippo Fara San Martino S.P.A. v. United States,* 980 F. Supp. 485, 487 (Ct. Int'l Trade 1997); *Saha Thai Steel Pipe Co., Ltd. v. United States*, 661 F. Supp. 1198, 1202–03 (Ct. Int'l Trade 1987). However, this Court has indicated that "a party is 'free to offer whatever *legal* arguments it chooses.'" *Koyo Seiko Co., Ltd. v. United States,* 955 F. Supp 1532, 1544 (Ct. Int'l Trade 1993) (citing *Sachs Auto. Prods. Co. v. United States*, 17 C.I.T. 740, 741 (1993)).

Both parties agree that Exhibit 1 to Plaintiffs' Brief is not part of the Agency Record. Clearly, Exhibit 1 will not be accepted or considered by this Court as a supplement to the record. However, this Court will not strike the exhibit or the accompanying discussion in Plaintiffs' Brief. This Court accepts Exhibit 1 and the discussion in Plaintiffs' Brief only to the narrow extent that it may offer support for a legal argument advanced by the Plaintiffs.

CONCLUSION

Based on the reasons stated above, this Court denies Defendant's Motion to Strike Exhibit 1 to Plaintiffs' Brief and the references thereto.

(Slip Op. 02–118)

LUOYANG BEARING FACTORY, PLAINTIFF AND DEFENDANT-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 99–12–00743

This consolidated action concerns the claims raised by plaintiff and defendant-intervenor, Luoyang Bearing Factory ("Luoyang"), and defendant-intervenor and plaintiff, The Timken Company ("Timken"), who move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of 1997–1998 Antidumping Duty Administrative Review and Final Results of New Shipper Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China ("Final Results")*, 64 Fed. Reg. 61,837 (Nov. 15, 1999).

Specifically, Luoyang contends that Commerce erred in selecting, for valuing the bearing quality steel bar used to manufacture tapered roller bearings ("TRBs") cups and cones, export data from Japan to India, rather than reviewing and using People's Republic of China ("PRC") trading company import data.

Timken contends that Commerce erred in: (1) including "consumption of traded goods" in Indian bearing producers' direct input costs when calculating the overhead, selling, general and administrative expenses ("SG&A") and profit rates; (2) selecting, for valuing PRC labor costs, the wage rates in Chapter 5 of the International Labor Office's ("ILO") 1998 Yearbook of Labor Statistics ("1998 Yearbook") rather than the labor costs reported in Chapter 6A of the ILO's 1998 Yearbook; (3) valuing certain steel inputs by using the price paid by a PRC bearing producer to a market-economy supplier; and (4) excluding the annual report data of the National Engineering Company ("NEI") in Commerce's determination of overhead, SG&A and profit rates.

Held: Luoyang's 56.2 motion is granted. Timken's 56.2 motion is granted in part and denied in part. This case is remanded to Commerce to: (1)(a) examine whether or not the PRC trading company import prices constitute the "best available information" to value either all of the subject merchandise at issue or a portion of the subject merchandise purchased by Luoyang through the trading company and used by Luoyang in the manufacture of TRB cups and cones and, if Commerce concludes that the PRC trading company import prices present the "best available information" for the purpose of such surrogate evaluation, to recalculate Commerce's determination not inconsistent with this opinion; and (b) examine if, and only if, Commerce finds that the PRC trading company import prices do not constitute the "best available information," whether or not Indonesian data (that is, Indonesian import statistics and export data from Japan to Indonesia) constitute the "best available information" over export data from Japan to India to value the bearing quality steel bar used in the production of TRB cups and cones, and to explain, (if Commerce finds that export data from Japan to India is the "best available information,") how the entire export data from Japan to India falls within the range of values in the United States category benchmark range; (2) exclude "consumption of traded goods" from Commerce's overhead, SG&A and profit rate calculations and to recalculate the dumping margins accordingly; and (3) (a) explain, with reference to the record, whether or not the PRC bearing producer's import data at issue was "meaningful"; and (b) provide the Court with an explanation as to why the PRC trading company data is not the "best available information" for the purpose of valuing either the entire factor of production ("FOP") (that is, both the directly imported FOP and the non-market economy country ("NME") sourced FOP) or the NME sourced FOP. Commerce's final determination is affirmed in all other respects.

[Luoyang's 56.2 motion is granted. Timken's 56.2 motion is granted in part and denied in part. Case remanded.]

(Dated October 1, 2002)

Hume & Associates, PC (Robert T. Hume and *Stephen M. De Luca)* for Luoyang, plaintiff and defendant-intervenor.[1]

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau);* of counsel: *Rina Goldenberg,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

Stewart and Stewart (Terence P. Stewart, Geert De Prest, Wesley K. Caine and *Amy S. Dwyer)* for Timken, defendant-intervenor and plaintiff.

OPINION

TSOUCALAS, *Senior Judge:* This consolidated action concerns the claims raised by plaintiff and defendant-intervenor, Luoyang Bearing Factory ("Luoyang"), and defendant-intervenor and plaintiff, The Timken Company ("Timken"), who move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of 1997–1998 Antidumping Duty Administrative Review and Final Results of New Shipper Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China ("Final Results"),* 64 Fed. Reg. 61,837 (Nov. 15, 1999).

Specifically, Luoyang contends that Commerce erred in selecting, for valuing the bearing quality steel bar used to manufacture tapered roller bearings ("TRBs") cups and cones, export data from Japan to India, rather than reviewing and using People's Republic of China ("PRC") trading company import data.

Timken contends that Commerce erred in: (1) including "consumption of traded goods" in Indian bearing producers' direct input costs when calculating the overhead, selling, general and administrative expenses ("SG&A"), and profit rates; (2) selecting, for valuing PRC labor costs, the wage rates in Chapter 5 of the International Labor Office's ("ILO") 1998 Yearbook of Labor Statistics ("1998 Yearbook") rather than the labor costs reported in Chapter 6A of the ILO's 1998 Yearbook; (3) valuing certain steel inputs by using the price paid by a PRC bearing producer to a market-economy supplier; and (4) excluding the annual report data of the National Engineering Company ("NEI") in Commerce's determination of overhead, SG&A and profit rates.

BACKGROUND

This case concerns the antidumping duty order on TRBs and parts thereof, finished and unfinished, from the PRC for the period of review ("POR") covering June 1, 1997, through May 31, 1998.[2] *See Final Results,* 64 Fed. Reg. at 61,837. On July 8, 1999, Commerce published the

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[1] On January 26, 2000, this Court granted Luoyang's Consent Motion For Intervention but Luoyang has not filed any briefs as a defendant-intervenor in this action.

[2] Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective January 1, 1995). *See Torrington Co. v. United States,* 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

preliminary results of the subject review. *See Preliminary Results of 1997–1998 Antidumping Duty Administrative Review and Partial Recission of Antidumping Duty Administrative Review of Tapered Roller Bearings and Parts Thereof Finished and Unfinished, From the People's Republic of China ("Preliminary Results")*, 64 Fed. Reg. 36,853. Commerce published the *Final Results* on November 15, 1999. *See Final Results*, 64 Fed. Reg. 61,837.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (2000) and 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

I. Substantial Evidence Test

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). Moreover, "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 22–23 (1st Cir. 1983) (quoting, in turn, *Universal Camera*, 340 U.S. at 488)).

II. Chevron Two-Step Analysis

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving

it its plain meaning. Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.* (citations omitted); *but see Floral Trade Council v. United States,* 23 CIT 20, 22 n.6, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "[n]ot all rules of statutory construction rise to the level of a canon, however") (citation omitted).

If, after employing the first prong of *Chevron,* the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction of the statute is permissible. *See Chevron,* 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States,* 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided Commerce has acted rationally, the Court may not substitute its judgment for the agency's. *See Koyo Seiko Co. v. United States,* 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"); *see also IPSCO, Inc. v. United States,* 965 F.2d 1056, 1061 (Fed. Cir. 1992). The "[C]ourt will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States,* 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted). In determining whether Commerce's interpretation is reasonable, the Court considers the following non-exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole. *See Mitsubishi Heavy Indus. v. United States,* 22 CIT 541, 545, 15 F. Supp. 2d 807, 813 (1998).

DISCUSSION

I. Commerce's Selection of Export Data from Japan to India as a Surrogate Value for Bearing Quality Steel Bar Used by a PRC Producer to Manufacture TRB Cups and Cones

A. Background

1. Statutory Background

An antidumping margin is the difference between normal value ("NV") and United States price of the merchandise. When the merchandise is produced in a non-market economy country ("NME") such as the PRC, Commerce constructs NV pursuant to section 1677b(c), which provides that

> the valuation of the factors of production shall be based on *the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce].*

19 U.S.C. § 1677b(c)(1) (1994) (emphasis supplied).

The statute does not define the phrase "best available information," it only provides that

> [Commerce], in valuing factors of production * * *, shall utilize, to the extent possible, the prices or costs of factors of production in *one or more market economy countries* that are—
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> (A) at a level of economic development comparable to that of the nonmarket economy country, and
>
> (B) significant producers of comparable merchandise.

19 U.S.C. § 1677b(c)(4) (1994) (emphasis supplied).

Thus, the statute grants to Commerce broad discretion to determine the "best available information" in a reasonable manner on a case-by-case basis. *See Lasko Metal Prods., Inc. v. United States ("Lasko")*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (noting that the statute "simply does not say—anywhere—that the factors of production must be ascertained in a single fashion.") Consequently, Commerce values as many factors of production ("FOPs") as possible using information obtained from the "primary" surrogate country, that is, the country that Commerce considers to be most comparable in economic terms to the NME country being investigated, and that also produces merchandise comparable to the subject merchandise. *See, e.g., Tianjin Mach. Import & Export Corp. v. United States*, 16 CIT 931, 940–41, 806 F. Supp. 1008, 1018 (1992); *Timken Co. v. United States*, 16 CIT 142, 143–44, 788 F. Supp. 1216, 1218 (1992). Additionally, if Commerce determines that suitable values cannot be obtained from the data of the primary surrogate country, Commerce resorts to the data from the second, and sometimes the third, surrogate. *See, e.g., Timken Co. v. United States ("Timken 2001")*, 25 CIT ____, ____, 166 F. Supp. 2d 608, 621–23 (2001); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 55,625, 55,629 (Nov. 8, 1994); *Final Determination of Sales at Less Than Fair Value: Certain Helical Spring Lock Washers From the People's Republic of China*, 58 Fed. Reg. 48,833, 48,835 (Sept. 20, 1993).

2. Factual Background

During this review, Commerce initially chose secondary surrogate data (that is, export data from Japan to Indonesia) over data from the primary surrogate country (that is, India) to value bearing quality steel bar used by Luoyang, a PRC producer, in the manufacturing of TRB cups and cones.[3] *See Preliminary Results*, 64 Fed. Reg. at 36,856; *see also* Def.'s Mem. Opp'n Luoyang's Mot. J. Agency R. ("Def.'s Mem. Opp'n Luoyang"), App. Ex. 4. In the *Preliminary Results*, Commerce also determined that it would use export data from Japan to Indonesia to value the steel bar purchased by Luoyang from a PRC trading compa-

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[3] "To make cups and cones, Luoyang used both domestic and imported hot-rolled[,] [that is, bearing quality] steel bar. The imported steel bar was imported from a *market economy* country for Luoyang by a [PRC] trading company." Pl.'s Mem. P. & A. Supp. Rule 56.2 Mot. J. Agency R. ("Luoyang's Mem.") at 5 (emphasis supplied); *see also* Def.'s Mem. Opp'n Luoyang's Mot. J. Agency R. ("Def.'s Mem. Opp'n Luoyang") at 3–5 (citing Def.'s Mem. Opp'n Luoyang, Proprietary App. Exs. 1, 2, and 4).

ny rather than that "trading company['s] prices." *Preliminary Results,* 64 Fed. Reg. at 36,856.

Commerce explained that in order to value the steel bar used by Luoyang to manufacture TRB cups and cones, Commerce compared several data sources (including: (1) Indian import statistics; (2) export data from Japan to India; (3) Indonesian import statistics; and (4) export data from Japan to Indonesia) to the United States import statistics for the Harmonized Tariff Schedule ("HTS") category which "isolates bearing quality steel used in the production of cups and cones and has been used for comparison purposes in past reviews." Def.'s Mem. Opp'n Luoyang, App. Ex. 4 at 4 (citing *Final Results of 1996–1997 Antidumping Duty Administrative Review and New Shipper Review and Determination Not To Revoke Order in Part of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China ("10th Annual Review"),* 63 Fed. Reg 63,842, 63,845 (Nov. 17, 1998)). Commerce reasoned that it decided to use export data from Japan to Indonesia to value steel bar used in the production of TRB cups and cones over import data from India because Commerce determined that steel values contained in the Indian import data were not reliable for two reasons: (1) Commerce was unable to isolate Indian import value for bearing quality steel used to manufacture the merchandise at issue; and (2) when compared with the United States import statistics "the[] Indian values [were] too high to be considered a reliable indicator of the value of bearing quality steel used for the production of cups and cones." Def.'s Mem. Opp'n Luoyang, App. Ex. 4 at 4. Similarly, Commerce determined that: (1) export data from Japan to India was unreliable because "the prices [were] too high, when compared to the U.S. benchmark," *id.;* and (2) "[a]lthough * * * Indonesian [import statistics] [were] closer to the U.S. benchmark in terms of price than the Indian values, like the Indian data, the Indonesian import statistics d[id] not provide a further breakdown of the aforementioned Indonesian basket category." *Id.* at 4–5. Commerce, however, re-examined the matter after considering comments made by Timken, namely, that Commerce can use a "range of [United States import] prices contained in HTS category 7228.30.20 * * * to gauge the reliability of Indian import values." *Final Results,* 64 Fed. Reg. at 61,839.

Upon examining the United States import data from HTS category 7228.30.20, Commerce determined that during the POR, "the range of prices from the countries with the most significant volumes of sales [was] approximately $642 [per metric ton ("MT")] to $834 [per MT]." *Id.* In the *Final Results,* Commerce compared Indian import data to the range of United States prices and found that: (1) as "in the past, [Commerce] [was] unable to isolate bearing quality steel in Indian import category 7228.30 because none of the eight-digit sub-categories within 7228.30 specifically include bearing quality steel bar," *id.* at 61,839–40; and (2) although the "'Others' category, 7228.3019, could contain the type of steel [at issue,] * * * the Indian values continue to be unreliable

because the values for these imports remain significantly higher than any price in the U.S. import range." *Id.* at 61,840.

Since the Indian import data was unreliable, Commerce then proceeded to examine export data from Japan to India. *Id.* Commerce observed that the export data from Japan to India "f[e]ll within the range of the values in the U.S. [benchmark] category," 7228.30.20, that is, the value of steel imported into the United States during the POR which ranged from $642 per MT to $834 per MT. *Id.* Consequently, Commerce concluded that export data from Japan to India would constitute the best available information to value steel used to produce the merchandise at issue. *See id.* Commerce stated that

> [b]ecause this Japanese tariff category is the narrowest category which could contain bearing quality steel, and because it is consistent with values contained in * * * [the United States] benchmark category, [Commerce] believe[s] that these data are the best alternative for valuing steel used in the production of cups and cones. It is [Commerce's] stated preference to use information from its primary surrogate to the extent possible * * *. Because these data relate to [Commerce's] primary surrogate and are within the price range of the U.S. benchmark category, [Commerce] ha[s] not analyzed data from [Commerce's] secondary surrogate, Indonesia, to find a value for steel used to produce cups and cones.

Final Results, 64 Fed. Reg. at 61,840.

Commerce refused to use Luoyang's PRC trading company import prices to value the bearing quality steel bar used in the production of the subject merchandise at issue. *See id.* at 61,845. Commerce pointed out:

> [Commerce] recognize[s] that in *[Olympia Indus., Inc. v. United States ("Olympia 1999"),* 23 CIT 80, 36 F. Supp. 2d 414 (1999)], the Court, in dicta, stated that Commerce must test the reliability of the trading company value in order to determine whether it comprises the best available information for purposes of the FOP calculation. However, Commerce respectfully disagrees with the Court's interpretation of the statute. As [Commerce] stated in [Commerce's] * * * *Final Results of Redetermination Pursuant to Court Remand of Olympia Indus., Inc. v. United States [("Olympia 1998"),* 22 CIT 387, 7 F. Supp. 2d 997 (1998)] * * *, nothing in the *Lasko,* [43 F.3d 1442,] decision alters the statutory mechanism for selection of surrogate values. In *Lasko,* the Court [of Appeals for the Federal Circuit ("CAFC")] merely recognized that, where the *actual* cost to the producer was a market economy price (and paid in a market economy currency), the *actual* cost to the producer was better information than a surrogate value. *See Lasko,* 43 F.3d at 1446. The selection of surrogate values is governed by section [1677b(c)(4)] * * *, which, as discussed above, establishes a preference for values from a comparable market economy that is a significant producer of comparable merchandise. Had Congress intended a preference for using import prices into the NME as surrogate values, it could easily have stated this preference.

Id. (emphasis in original).

B. Contentions of the Parties

1. Luoyang's Contentions

Luoyang contends that Commerce's decision to value bearing quality steel bar by using export data from Japan to India was not supported by substantial evidence and was contrary to law. *See* Pl.'s Mem. P. & A. Supp. Rule 56.2 Mot. J. Agency R. ("Luoyang's Mem.") at 10–15, 17–31; Luoyang's Reply Br. ("Luoyang's Reply") at 2–15. In particular, Luoyang argues that Commerce's refusal to review PRC trading company import prices "and to determine whether that data constituted the best available information for purposes of the FOP analysis," Luoyang's Mem. at 17, was (1) an "[un]reasonable interpretation of [19 U.S.C. § 1677b(c)(1)]," *id.* at 21 (citing *Olympia 1998*, 22 CIT at 392, 7 F. Supp. 2d at 1002); (2) an "utter disregard" of *Olympia 1999*, 23 CIT 80, 36 F. Supp. 2d 414, Luoyang's Mem. at 17; and (3) inconsistent with Commerce's prior administrative determination in the *10th Annual Review*, 63 Fed. Reg. at 63,853–54.[4] *See* Luoyang's Mem. at 24–27. Luoyang maintains that the PRC trading company import data constitutes the "best available information" because "'[t]he cost for raw materials from a market economy supplier, paid in convertible currencies, provides Commerce with the closest approximation of the cost of producing the goods in a market economy country,'" Luoyang's Mem. at 23 (quoting *Lasko Metal Prods., Inc. v. United States ("Lasko Metal")*, 16 CIT 1079, 1081, 810 F. Supp. 314, 317 (1992), *aff'd, Lasko*, 43 F.3d 1442), and "'[t]he same holds true * * * with respect to the trading company data.'"[5] Luoyang's Mem. at 23 (quoting *Olympia 1998*, 22 CIT at 392, 7 F. Supp. 2d at 1002).

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[4] Luoyang points out that in past reviews, "Commerce has determined that [NV] can most accurately be calculated by first valuing the factors of production on the basis of prices paid by the nonmarket economy country to market-economy suppliers *before* resorting to surrogate values." Luoyang's Mem. at 24 (emphasis in original) (citing *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*, 56 Fed. Reg. 20,588, 20,590 (May 6, 1991); *Final Determinations of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans From the People's Republic of China ("Oscillating Fans")*, 56 Fed. Reg. 55,271 (Oct. 25, 1991); and *Final Results of Antidumping Duty Administrative Review: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the Republic of Hungary*, 55 Fed. Reg. 21,066, 21,067 (May 22, 1990)).

Moreover, Luoyang asserts that in the *10th Annual Review*, 63 Fed. Reg. at 63,853–54, "Commerce addressed the question [of] whether trading company import prices, as alternate surrogate data, are preferable to surrogate data from a market-economy country that is a significant producer and at a level of comparable economic development." Luoyang's Mem. at 25. In that review, Commerce stated:

> "To assess the reliability of the Chinese trading company's steel prices, [Commerce] * * * examined the [following] factors outlined in * * * *Olympia I 1999*, 23 CIT at 82, 36 F. Supp. 2d at 416] * * *: (1) the value and volume of steel imports, (2) the type and quality of the imported steel, and (3) consumption of imported steel by the NME producer.
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> * * * * * * *
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> Regarding the value of the steel imported by the trading company, [Commerce] found that the price paid by the trading company is within the range of prices created by the actual steel prices paid by PRC producers and [Commerce's] surrogate value. Consequently, the price paid by the PRC trading company is not aberrational. With respect to volume and consumption of steel by the NME producer [Commerce] note[s] that the amount of steel imported by the trading company was significant and that the NME producer in question consumed a significant amount of imported steel to produce the subject merchandise.
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> Based on the above, *[Commerce is] using the trading company import steel price as surrogate data for those companies that actually used the imported steel."*

Id. at 25 (emphasis in original) (quoting *10th Annual Review*, 63 Fed. Reg. at 63,854).

Applying Commerce's three-prong test, Luoyang maintains that "[t]he PRC trading company prices [in the case at bar] are not aberrational and satisfy each of the *Olympia I 1999*, 23 CIT 80, 36 F. Supp. 2d 414] criteria." Luoyang's Mem. at 26.

[5] Luoyang further maintains that "[u]se of the PRC trading company data would lead to the most accurate, fair and predictable dumping margin calculations because this data shows what Luoyang's costs or prices would be if determined by market forces." Luoyang Mem. at 24 (citing *Olympia 1998*, 22 CIT at 392, 7 F. Supp. 2d at 1002).

Responding to Commerce's argument that Commerce's "policy [i]s to evaluate inputs sourced from market-economy suppliers only when those inputs are actually purchased by the NME [producer], and not when purchased by NME trading companies," Luoyang's Mem. at 19, Luoyang asserts that: (1) 19 C.F.R. § 351.408(c)(1) (1998) does not "limit the use of NME import prices from market economy countries to those paid by the producer," Luoyang's Reply at 4; (2) both *Olympia 1999,* 23 CIT at 83, 36 F. Supp. 2d at 417, and *Olympia 1998,* 22 CIT at 390, 7 F. Supp. 2d at 1001, require Commerce, pursuant to 19 U.S.C. § 1677b(c)(1), to review PRC trading company import prices and to determine whether that data constitutes the best available information for the FOP analysis, *see* Luoyang's Mem. at 20; (3) "Commerce used trading company prices to value factors of production" in the *10th Annual Review,* 63 Fed. Reg. at 63,854, Luoyang's Reply at 4; (4) although the language in "the commentary accompanying the promulgation of [19 C.F.R. § 351.408(c)(1)] noted that the NME buyer should be the 'producer,'" *id.,* "Commerce's use of the phrase 'normally'" means that Commerce did not choose to limit its evaluation of inputs sourced from market-economy suppliers solely to those inputs actually purchased by an NME producer, *id.* at 5;[6] and (5) 19 U.S.C. §§ 1677b(c)(1) and (c)(4), the legislative history of these provisions and *Lasko,* 43 F.3d 1442, do not prohibit the use of trading company import prices to value steel bar used in the production of TRB cups and cones. *See* Luoyang's Reply at 5–7. Luoyang, therefore, argues that a remand is necessary so that Commerce, by applying the three-pronged test approved in *Olympia 1999,* 23 CIT 80, 36 F. Supp. 2d 414, would review and assess the reliability of the PRC trading company import prices as a surrogate to value all the bearing quality steel bar used by Luoyang to manufacture TRB cups and cones and, if Commerce "finds that the data is not 'aberrational' and * * * me[ets] the requirements of the *Olympia [1999]* reliability test," to use the PRC trading company data to value all of the subject merchandise at issue. Luoyang's Mem. at 31. In the alternative, Luoyang asserts that the PRC trading company data should be used as a surrogate to value "the steel Luoyang purchased through the trading company and actually used in the manufacture of those subject cups and cones." *Id.*

Next, Luoyang argues that Commerce erred in selecting export data from Japan to India under HTS category 7228.30.900 to value the subject merchandise at issue because that data is not an appropriate surrogate. *See id.* at 27–29; *accord* Luoyang's Reply at 8–12. In particular, Luoyang maintains that: (1) "the surrogate values based on * * * [ex-

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[6] In its reply brief, Luoyang cites to the commentary accompanying the promulgation of 19 C.F.R. § 351.408(c)(1). *See* Luoyang's Reply at 4 n.1 (citing *Final Rule on Antidumping Duties; Countervailing Duties ("Final Rule"),* 62 Fed. Reg. 27,296 (May 19, 1997). The *Final Rule* provides in pertinent part:

> [Commerce] normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, [Commerce] normally will use the price paid to the market economy supplier. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, [Commerce] normally will value the factor using the price paid to the market economy supplier.

62 Fed. Reg. at 27,413; 19 C.F.R. § 351.408(c)(1).

port data from Japan] to India represent values for steel in category 7228.30.900 which *could* include the type of steel used to produce the cups and cones, but which in fact also *may not* include the type of steel used," Luoyang's Mem. at 27 (emphasis in original) (citing *Final Results*, 64 Fed. Reg. at 61,840); and (2) the export data from Japan to India fell outside the United States benchmark range of $642 per MT to $834 per MT. *See* Luoyang's Reply at 8–9.[7] Responding to Commerce's statement that "Commerce's regulations give preference to the use of one surrogate country" to value all factors of production, Luoyang argues that there is no such restriction.[8] *Id.* at 9; *see also* Luoyang's Reply at 10–11 (citing *10th Annual Review*, 63 Fed. Reg. at 63,846; *Final Results of Antidumping Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China*, 62 Fed. Reg. 61,276, 61,282 (Nov. 17, 1997); and *Timken Co. v. United States*, 82 F. Supp. 2d 1371 (CIT 1999) [sic].[9]) Luoyang, therefore, asserts that if PRC trading company import prices are not used as a surrogate, Commerce should use export data from Japan to Indonesia over export data from Japan to India as a surrogate to value the subject merchandise at issue. *See* Luoyang's Mem. at 32. Alternatively, Luoyang contends that if the Court sustains Commerce's use of export data from Japan to India as a surrogate to value the subject merchandise at issue, the values for January 1998 and March 1998 should be excluded because they are aberrational. *See id.*

2. Commerce's Contentions

Commerce responds that its decision to use export data from Japan to India to value bearing quality steel bar used by Luoyang to manufacture TRB cups and cones is supported by substantial evidence and otherwise in accordance with law. *See* Def.'s Mem. Opp'n Luoyang at 15–28. Specifically, Commerce maintains that its selection of the export data from Japan to India as the "best available" surrogate value should be sustained because that data represents "'a category which would include the type of bearing quality steel bar [used in the production of the subject merchandise]'; and * * * 'these Japanese export prices to India fall within the range of the values in the [United States benchmark].'"

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[7] In its reply brief, Luoyang points out that "for only three months did the monthly Japanese export prices to India fall within the [United States benchmark] range." Luoyang's Reply at 9 (citing *id.*, Pub. Doc. 141 at Att. 1). "For the other nine (9) months the prices were either below (Apr–98 at $561 [per MT]) or above (the other 8 months)." Luoyang's Reply at 9. Additionally, Luoyang asserts that

> [t]he range of values for [export data from Japan] to India in HTS category 7228.30.900 was $561 per metric ton to $1,414 per metric ton and the average value was $871 per metric ton. * * * The average value of $871 per metric ton is *not* between [the United States benchmark range of] $642 per metric ton and $834 per metric ton.

Id. at 8–9 (emphasis in original) (citing Def.'s Mem. Opp'n Luoyang at 9).

[8] The Court shall not entertain Commerce's statement since the Court is not aware of any particular preference which trumps the general requirement for precision that underlines the antidumping law. *See Timken 2001*, 25 CIT at ___, 166 F. Supp. 2d at 621 (stating that "[t]he statute permits Commerce to draw surrogate value information from more than one market economy country," citing 19 U.S.C. § 1677b(c)(1); and quoting *Chemical Prods. Corp. v. United States*, 10 CIT 700, 706, 650 F. Supp. 178, 182 (1986)(which provides that "'[t]he regulation [relied upon by Commerce] is silent concerning whether Commerce may use data from a country other than its designated surrogate when Commerce finds that a comparison of one element of foreign market value in the surrogate would yield an unrealistic result.'")

[9] The Court assumes that the correct citation is *Timken Co. v. United States ("Timken 1999")*, 23 CIT 509, 59 F. Supp. 2d 1371 (1999).

Def.'s Mem. Opp'n Luoyang at 18 (quoting *Final Results*, 64 Fed. Reg. at 61,840). Responding to Luoyang's argument that "Commerce's selection of [export data from Japan to India] is erroneous because it 'only theoretically includes bearing steel prices,'" Commerce maintains that Luoyang's argument is merely a crafty restatement of "Commerce's own statement" aiming to distort the gist of Commerce's conclusion.[10] Def.'s Mem. Opp'n Luoyang at 18. With respect to Luoyang's argument that the export data from Japan to India is not a reliable surrogate, Commerce points out that "'[t]he court's role is not to determine whether the information chosen by Commerce is the 'best' actually available, but whether the choice is supported by substantial evidence and is in accordance with law.'" *Id.* at 19 (quoting *Novachem, Inc. v. United States*, 16 CIT 782, 786, 797 F. Supp. 1033, 1037 (1992)).[11]

Additionally, Commerce argues that its decision to reject the PRC trading company data as an alternative for valuing the bearing quality steel bar used in the production of the subject merchandise at issue was in accordance with law. *See* Def.'s Mem. Opp'n Luoyang at 20–28. Relying on *Lasko*, 43 F.3d 1442, and 19 C.F.R. § 351.408(c)(1), Commerce asserts that the transaction involving the PRC trading company's purchase of the steel bar at issue from a market-economy country does not "qualif[y] as a market economy purchase." *Id.* at 22. In particular, Commerce maintains that: (1) "the commentary accompanying the promulgation of [19 C.F.R. § 351.408(c)(1)] makes clear that Commerce intended to use a market economy price to value a factor of production only when the PRC producer itself made the purchase," *id.* (citing *Final Rule*, 62 Fed. Reg. at 27,366); and (2) "the use of the price paid by Luoyang to the trading company in question would be contrary to congressional intent because that [NME] transaction is not reliable." Def.'s Mem. Opp'n Luoyang at 24 (citing S. Rep. No. 93–1298 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7311).

Contrary to Luoyang's argument that both *Olympia 1999*, 23 CIT at 83, 36 F. Supp. 2d at 417, and *Olympia 1998*, 22 CIT 387, 7 F. Supp. 2d 997, require Commerce to review PRC trading company import prices and to determine whether that data constitutes the best available information for the FOP analysis pursuant to 19 U.S.C. § 1677b(c)(1), Commerce maintains that it disagrees with those decisions and that *Lasko*, 43 F.3d at 1446, "'merely recognized that, where the *actual* cost to the

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[10] The Court agrees with Commerce and is not persuaded by Luoyang's assertion since Luoyang fails to use evidence on the record to illustrate that export data from Japan to India does not include the type of steel used to produce the TRB cups and cones at issue.

[11] Commerce contends that Luoyang "does not challenge Commerce's conclusion that the average [export data from Japan to India] falls within the [United States] benchmark range." Def.'s Mem. Opp'n Luoyang at 19. Moreover, Commerce asserts that "by suggesting the adoption of its own benchmark methodology while failing to find error with the methodology actually used by Commerce, Luoyang is merely challenging the correctness of Commerce's result." *Id.* at 20.

The Court disagrees with Commerce. Although Luoyang initially stated in its brief that "the average figure [that is, the average value of export data from Japan to India] is within the range of the [United States] benchmark range," Luoyang's Mem. at 28, in its reply brief Luoyang argues that

> [t]he range of values for [export data from Japan] to India in HTS category 7228.30.900 was $561 per metric ton to $1,414 per metric ton and the average value was $871 per metric ton. * * *The average value of $871 per metric ton is *not* between [the United States benchmark range of] $642 per metric ton and $834 per metric ton.

Luoyang's Reply at 8–9 (emphasis in original) (citing Def.'s Mem. Opp'n Luoyang at 9).

producer was a market economy price (and paid in a market economy currency), the *actual* cost to the producer was better information than a surrogate value.'" Def.'s Mem. Opp'n Luoyang at 25 (quoting *Final Results,* 64 Fed. Reg. at 61,845, emphasis in original). Commerce further maintains that it properly rejected PRC trading company import prices from its FOP analysis because "[t]his 'actual cost' does not exist in the trading company situation because the price paid by the trading company to the market economy supplier does not reflect the price paid by the PRC producer to the trading company." Def.'s Mem. Opp'n Luoyang at 25.

Commerce concedes that during its prior determination (that is, *10th Annual Review,* 63 Fed. Reg. at 63,854), it adhered to *Olympia 1999,* 23 CIT at 83, 36 F. Supp. 2d at 417, and *Olympia 1998,* 22 CIT 387, 7 F. Supp. 2d 997, by reviewing PRC trading company import prices and determining whether that data constituted the best available information for purposes of the FOP analysis, *see id.* at 27. However, Commerce maintains that

> [h]aving reconsidered the meaning of *Lasko,* [43 F.3d 1442,] and the statute's NME provisions, Commerce now views *Lasko,* [43 F.3d 1442] as limited to the situation involving the actual cost to the producer (not the price paid by the trading company). Commerce further views the statute itself as expressing a preference for the use of values from a comparable market economy that is a significant producer of comparable merchandise. Moreover, in [*10th Annual Review,* 63 Fed. Reg. 63,842], Commerce conducted its review applying its prior regulations. * * * The current regulations do not permit the result advocated by Luoyang.

Id. at 27–28.

3. Timken's Contentions

Timken generally agrees with Commerce and maintains that Commerce's decision to use export data from Japan to India to value the bearing quality steel bar used by Luoyang in the production of TRB cups and cones over PRC trading company import prices was supported by substantial evidence and was in accordance with law. *See* Timken's Resp. Opp'n Pl.'s Mot. J. Agency R. ("Timken's Resp.") at 8–33. In particular, Timken argues that by selecting export data from Japan to India to value the subject merchandise at issue, Commerce "followed the statutory scheme [under 19 U.S.C. § 1677b(c)(4) and 19 C.F.R. § 351.408(c)(1)], since [Commerce] clearly used, 'to the extent possible,' the 'best available information' as judged by the surrogate selection."[12] Timken's Resp. at 9. Moreover, Timken asserts that the Court should

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[12] In its response brief Timken points out that

> [a]pplying * * * § 1677b(c)(4)['s preference] in this case, [Commerce] found that the use of values from its primary-surrogate-country India was possible. [Commerce] was, therefore, not required to assess the pros and cons of using PRC trading company import prices.

Timken's Resp. at 21; *see also id.* at 28–29.

Moreover, contrary to Luoyang's argument that Commerce should have used export data from Japan to Indonesia over export data from Japan to India, Timken contends that export data from Japan to India is the "best available information" to value the subject merchandise at issue because: (1) "Indonesia has only two bearings producers and neither produces [TRBs]" whereas "India's bearing industry has at least 17 producers and 7 producers of [TRBs]." *Id.* at 30.

sustain Commerce's selection of export data from Japan to India as the "best available information" to value the subject merchandise at issue because: (1) unlike export data from Japan to India which meets the statutory preference of 19 U.S.C. § 1677b(c)(4) since it constitutes a "surrogate value[] from a comparable market economy that is a significant producer of comparable merchandise[,] * * * there is no statutory preference, mandatory or otherwise, for the use of PRC trading company import prices," *id.* at 10; (2) export data from Japan to India is "consistent with the objectives of § 1677b(c)(4) which favor the use of publicly available sources of information to value factors of production," *id.* at 11, whereas "Luoyang's PRC trading company import prices are not broad, publicly-available information from a comparably reliable, verifiable, and reusable source," *id.* at 12; (3) Luoyang has failed to assert that it purchased the subject merchandise at issue from the PRC trading company in a convertible currency, *see id.;* and (4) Commerce's selection of export data from Japan to India to value the bearing quality steel bar used by Luoyang to manufacture TRB cups and cones was consistent with "[t]he purpose of the antidumping statute[s] [that is, 19 U.S.C. §§ 1677b(c)(1) and (4)] * * * to calculate dumping margins as accurately as possible." *Id.* (citing *Lasko,* 43 F.3d at 1446).

Additionally, Timken maintains that Luoyang's reliance on *Lasko,* 43 F.3d 1442, *Olympia 1999,* 23 CIT 80, 36 F. Supp. 2d 414, *Olympia 1998,* 22 CIT 387, 7 F. Supp. 2d 997, and *Olympia Indus., Inc. v. United States ("Olympia 1997"),* 21 CIT 364 (1997), is misplaced. *See* Timken's Resp. at 14–26. First, referring to *Lasko,* 43 F.3d at 1446, and *Olympia 1998,* 22 CIT at 390–91, 7 F. Supp. 2d at 1001, Timken asserts that the PRC trading company import prices are not actual prices but are merely surrogate values. *See* Timken's Resp. at 14 n.5. Second, Timken argues that the CAFC in *Lasko,* 43 F.3d at 1446, addressed "'whether or not * * * [Commerce was] permit[ted] to determine the factors of production using both surrogate country values and actual cost values,'" *id.* at 14–15 (quoting *Lasko,* 43 F.3d at 1445), and did not address the issue of the proper interpretation of 19 U.S.C. § 1677b(c)(4) or the use of Chinese trading company purchases as surrogates. *See id.* at 15. Third, Timken contends that the *Olympia* cases (that is, *Olympia 1999,* 23 CIT 80, 36 F. Supp. 2d 414, *Olympia 1998,* 22 CIT 387, 7 F. Supp. 2d 997, and *Olympia 1997,* 21 CIT 364) were "decided on [the] facts [of those cases] and did not address the proper interpretation of 19 U.S.C. § 1677b(c)(4)." *Id.* at 15–20. Fourth, Timken maintains that since the Court in *Olympia 1999,* 23 CIT 80, 36 F. Supp. 2d 414, took an "additional step of disapproving [Commerce's] interpretation of 19 U.S.C. § 1677b(c)(4)" by stating that Commerce must test the reliability of the trading company value in order to determine whether it comprises the best available information for purposes of the FOP calculation, this additional step was merely dicta and "this Court remains free to sustain" Commerce. *Id.* at 19–20. Finally, Timken asserts that Commerce is not required to apply the three-pronged test approved in *Olympia 1999,* 23 CIT 80, 36 F. Supp. 2d 414, to

review and assess the reliability of the PRC trading company import prices because: (1) "[t]here is no three-part * * * test in the statute or regulations compelling a specific methodology to be used in selecting surrogate values," *id.* at 23 (citing *Lasko,* 43 F.3d at 1446); and (2) Commerce, despite Commerce's application of the three-pronged test in the *10th Annual Review,* 63 Fed. Reg. 63,842, "provided a reasonable explanation * * * for rejecting PRC trading company import prices." Timken's Resp. at 24.

In the alternative, Timken argues that, if the Court remands to Commerce to review and assess the reliability of the PRC trading company import prices, Commerce should consider whether there was: (1) "a significant difference between the resale price and the PRC trading company import prices and whether that difference was sufficient to cover the trading company's costs"; (2) "any countertrade or other arrangements between the trading company and its market-economy supplier"; (3) "any commissions or other consideration paid by the purchaser or supplier to the trading company, or lack thereof"; and (4) "any affiliation between the trading company, the market-economy supplier and/or the Chinese manufacturer." *Id.* at 25. Moreover, Timken maintains that "[i]f the Court requires use of Luoyang's PRC trading company import prices, those prices should not be extended to value other purchases of steel." *Id.* at 26.

Next, contrary to Luoyang's argument that certain values of export data from Japan to India should be excluded because they are aberrational (that is, values for January 1998 and March 1998), Timken asserts that: (1) "the mere fact that some months were high is not a basis for exclusion," *id.* at 31; (2) "in any average, some values exceed the norm, while other values are below, *id.* at 32; and (3) "Luoyang cannot 'pick and choose' and conveniently eliminate only high values." *Id.*

C. Analysis

1. Commerce's Changes of Policy or Methodology

Agency statements provide guidance to regulated industries. While "'an agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the very near future,'" *Transcom, Inc. v. United States,* 24 CIT ____, ____, 123 F. Supp. 2d 1372, 1381 (2000) (quoting *ITT World Communications, Inc. v. FCC,* 725 F.2d 732, 754 (D.C. Cir. 1984)), Commerce, in view of the rapidly-changing world of global trade and Commerce's limited resources, should be able to rely on its "unique expertise and policy-making prerogatives." *Southern Cal. Edison Co. v. United States,* 226 F.3d 1349, 1357 (Fed. Cir. 2000). "'The power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy * * *.'" *Chevron,* 467 U.S. at 843 (quoting *Morton v. Ruiz,* 415 U.S. 199, 231 (1974)).

An agency decision involving the meaning or reach of a statute that reconciles conflicting policies "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the

statute, [and a reviewing court] should not disturb [the agency decision] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *Chevron,* 467 U.S. at 845 (quoting *United States v. Shimer,* 367 U.S. 374, 382–83 (1961)). Furthermore, an agency must be allowed to assess the wisdom of its policy on a continuing basis. Under the *Chevron* regime, agency discretion to reconsider policies is inalienable. *See Chevron,* 467 U.S. at 843. Any assumption that Congress intended to freeze an administrative interpretation of a statute would be entirely contrary to the concept of *Chevron* which assumes and approves the ability of administrative agencies to change their interpretations. *See, e.g., Maier, P.E. v. United States EPA,* 114 F.3d 1032, 1043 (10th Cir. 1997), *J.L. v. Social Sec. Admin.,* 971 F.2d 260, 265 (9th Cir. 1992), *Saco Defense Sys. Div., Maremont Corp. v. Weinberger,* 606 F. Supp. 446, 450–51 (D. Me. 1985). In sum, underlying agency interpretative policies "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 844.

Moreover, "'[a]n [agency] announcement stating a change in the method * * * is not a general statement of policy.'" *American Trucking Ass'ns, Inc. v. ICC,* 659 F.2d 452, 464 n.49 (5th Cir. 1981) (quoting *Brown Express, Inc. v. United States,* 607 F.2d 695, 701 (5th Cir. 1979) (internal quotations omitted)). While a policy "denotes * * * [the] general purpose * * * [of the statute] considered as directed to the welfare or prosperity of the state," BLACK'S LAW DICTIONARY 1157 (6th ed. 1990), methodology refers only to the "performing [of] several operations[] in the most convenient order," *id.* at 991; *accord Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897 (5th Cir. 1983); *Interstate Natural Gas Ass'n of Am. v. Federal Energy Regulatory Comm'n,* 716 F.2d 1 (D.C. Cir. 1983); *Hooker Chems. & Plastics Corp. v. Train,* 537 F.2d 620 (2d Cir. 1976). Consequently, the courts are even less in the position to question an agency action if the action at issue is a choice of methodology, rather than policy. *See, e.g., Maier, P.E.,* 114 F.3d at 1043 (citing *Professional Drivers Council v. Bureau of Motor Carrier Safety,* 706 F.2d 1216, 1221 (D.C. Cir. 1983)). Similarly, an agency decision to change its methodology, that is, to take an act of statutory implementation while pursuing the same policy, should be examined under the *Chevron* test and sustained if the new methodology is reasonable. *See, e.g., Koyo Seiko Co., v. United States,* 24 CIT ____, ____, 110 F. Supp. 2d 934, 942 (2000) (stating that "'the use of different methods [of] calculati[on] * * * does not [mean there is a] conflict with the statute,'") (quoting *Torrington Co. v. United States,* 44 F.3d 1572, 1578 (Fed. Cir. 1995)).

Therefore, Commerce's refusal to review and use PRC trading company import data and Commerce's consequential use of export data from Japan to India as a surrogate value for bearing quality steel bar used by Luoyang to manufacture TRB cups and cones was a justifiable change of methodology as long as such change in position was reasonably supported by the record.

2. Commerce's Determination at Bar

The CAFC has reasoned that "the purpose of the statutory provisions [that is, 19 U.S.C. §§ 1677b(c)(1) and (4)] is to determine antidumping margins 'as accurately as possible.'" *Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States,* 268 F.3d 1376, 1382 (Fed. Cir. 2001) (quoting *Lasko,* 43 F.3d at 1446); *see also Olympia 1998,* 22 CIT at 390, 7 F. Supp. 2d at 1000–01 (noting that "accuracy is the touchstone of the antidumping statute" and citing *Rhone Poulenc, Inc. v United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990)). Additionally, Commerce's "task in [an NME] investigation is to calculate what * * * [the] costs or prices would be [in the NME] if such prices or costs were determined by market forces." *Tianjin,* 16 CIT at 940, 806 F. Supp. at 1018.

a. Commerce's Refusal to Review and Use PRC Trading Company Import Prices

The Court finds that Commerce's refusal to review PRC trading company import prices and to determine whether that data constituted the best available information for purposes of the FOP analysis was unreasonable. Specifically, the Court disagrees with Commerce's and Timken's narrow reading of *Lasko,* 43 F.3d 1442, and 19 C.F.R. § 351.408(c)(1).[13] The Court in *Lasko Metal,* 16 CIT at 1081, 810 F. Supp. at 317, reasoned that "[t]he cost for raw materials from a market economy supplier, paid in convertible currencies, provides Commerce with the closest approximation of the cost of producing the goods in a market economy country." Additionally, the CAFC observed:

> "[w]here [it] can [be] determine[d] that a [non-market economy] producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, *be contrary to the intent of the law.*"

Shakeproof, 268 F.3d at 1382 (emphasis in original) (quoting *Lasko,* 43 F.3d at 1446); *accord Oscillating Fans,* 56 Fed. Reg. at 55,275; *see also Olympia 1998,* 22 CIT at 392, 7 F. Supp. 2d at 1002 (stating that the "same holds true here with respect to the trading company data"); *Timken Co. v. United States,* 26 CIT ___, ___, 201 F. Supp. 2d 1316, 1335 (2002)(finding that "Commerce's decision to use [a] PRC trading company's import steel price as surrogate data for [certain PRC producers] is reasonable, is in accordance with law and is in accord with the purpose of the statutory provisions [that is, §§ 1677b(c)(1) and (c)(4)] to determine antidumping margins as accurately as possible").

Next, observing that 19 U.S.C. § 1677b(c)(1) does not specify what constitutes "best available information," the Court concludes that "'[t]he statute[,] [therefore,] does not require Commerce to follow any single approach in evaluating data.'" *Timken 1999,* 23 CIT at 515, 59 F.

[13] The Court also disagrees with Timken that Commerce was not required to assess the PRC trading company data since Commerce, applied 19 U.S.C. § 1677b(c)(4)'s preference by valuing the subject merchandise using values from its primary surrogate (that is, India). The Court finds that there is no requirement that Commerce value FOPs pursuant to 19 U.S.C. § 1677b(c)(4) prior to resorting to a PRC trading company's import prices paid to a market-economy supplier to value material costs for certain steel inputs.

Supp. 2d at 1376 (quoting *Olympia 1997*, 21 CIT at 368, and citing *Lasko*, 43 F.3d at 1446); *see also Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 23 CIT 479, 481, 59 F. Supp. 2d 1354, 1357 (1999), *aff'd, Shakeproof*, 268 F.3d 1376 (stating that the "statute requires Commerce to use the best available information, but does not define that term" and quoting *Olympia 1998*, 22 CIT at 389, 7 F. Supp. 2d at 1000, that "'[t]he relevant statute does not clearly delineate how Commerce should determine what constitutes'" the best available information). While the Court finds that Commerce is not required to apply the three-pronged test approved in *Olympia 1999*, 23 CIT 80, 36 F. Supp. 2d 414, to review and assess the reliability of the PRC trading company import prices, the Court remands this issue to Commerce with instructions to examine whether or not the PRC trading company import prices constitute the "best available information" to value either all of the subject merchandise at issue or a portion of the subject merchandise purchased by Luoyang through the trading company and used by Luoyang in the manufacture of TRB cups and cones and, if Commerce concludes that the PRC trading company import prices present the "best available information" for the purpose of such surrogate evaluation, to recalculate Commerce's determination not inconsistent with this opinion.

b. Commerce's Decision to Value Bearing Quality Steel Bar by Using Export Data from Japan to India

The Court disagrees with Commerce and Timken that Luoyang is assailing not the reasoning but rather the correctness of Commerce's result, which is outside the Court's standard of review. *See Writing Instrument Mfrs. Ass'n, Pencil Section v. United States*, 21 CIT 1185, 1195, 984 F. Supp. 629, 639 (1997). During the review at issue, Commerce observed:

> In comparing [export data from Japan to India] to the range of values contained in the [United States] benchmark [that is, the value of steel imported into the United States during the POR under HTS category 7228.30.20 which ranged from $642 per MT to $834 per MT], [Commerce] found that these Japanese export prices to India fall within the range of the values in the [United States] category.

Final Results, 64 Fed. Reg. at 61,840.

Nevertheless, as Luoyang points out:

> The range of values for [export data from Japan] to India in HTS category 7228.30.900 was $561 per metric ton to $1,414 per metric ton and the average value was $871 per metric ton. * * * The average value of $871 per metric ton is *not* between [the United States benchmark range of] $642 per metric ton and $834 per metric ton.

Luoyang's Reply at 8–9 (emphasis in original) (citing Def.'s Mem. Opp'n Luoyang at 9).

However, the Court disagrees with Luoyang that the Court should order that Commerce exclude the values for January 1998 and March 1998 from the export data from Japan to India. Luoyang may not usurp Com-

merce's role as fact-finder and substitute Luoyang's analysis for the result reached by Commerce.

Next, with respect to Luoyang's argument that Commerce should have used export data from Japan to Indonesia over export data from Japan to India as a surrogate to value the subject merchandise at issue, the Court notes that Commerce admittedly failed to review export data from Japan to Indonesia as a surrogate value. *See Final Results*, 64 Fed. Reg. at 61,840 (Commerce "ha[s] not analyzed data from [Commerce's] secondary surrogate, Indonesia, to find a value for steel used to produce cups and cones"). The Court finds that Commerce's reasoning for refusing to review the export data from Japan to Indonesia as a surrogate value was not sufficiently explained. To the contrary, it was illogical for Commerce to utilize export data from Japan to India and then to subsequently fail to review analogously structured export data from Japan to Indonesia.

Based on the foregoing, the Court remands this issue to Commerce to examine if, and only if, Commerce finds that the PRC trading company import prices do not constitute the "best available information," whether or not Indonesian data (that is, Indonesian import statistics and export data from Japan to Indonesia) constitute the "best available information" over export data from Japan to India to value the bearing quality steel bar used in the production of TRB cups and cones, and to explain, (if Commerce finds that export data from Japan to India is the "best available information,") how the entire export data from Japan to India falls within the range of values in the United States category benchmark range.

II. Commerce's Inclusion of "Consumption of Traded Goods" in Indian Bearings Producers' Direct Input Costs

A. Background

In the *Final Results*, Commerce designated the line item "consumption of traded goods" in certain Indian bearings producers' 1997–98 annual reports as material costs to be included in direct input costs that were used as the denominator of the overhead, SG&A, and profit rate calculations. *See* 64 Fed. Reg. at 61,844; *see also* Def.'s Mem. Partial Opp'n Timken's Mot. J. Agency R. ("Def.'s Mem. Partial Opp'n Timken), App. Ex. 5 at 3–4. Specifically, Commerce explained that

> [Commerce] disagree[s] that [Commerce] should exclude "Consumption of Traded Goods" from the direct input costs calculated for the Indian bearings producers. Although the CIT did instruct [Commerce] to exclude the purchases of traded goods from the cost of manufacture with respect to the 1994–95 administrative review of TRBs in *Timken v. U.S.*, [23 CIT 509, 59 F. Supp. 2d 1371], that ruling is not yet final. Thus, [Commerce is] not compelled to apply the court-directed methodology in these reviews.
>
> [Commerce] further note[s] that [Commerce] excluded "Consumption of Traded Goods" from [Commerce's] direct input costs calculation in the preliminary results of the new shipper review. Again, because *Timken v. U.S.*, [23 CIT 509, 59 F. Supp. 2d 1371] is

> not yet final, [Commerce] ha[s] revised [Commerce's] preliminary calculations to include the traded goods amount in direct input costs.

Final Results, 64 Fed. Reg. at 61,844.

B. Contentions of the Parties

Timken asserts that the "consumption of traded goods" should be excluded from the direct input costs denominator used in the overhead, SG&A and profit rate calculations. *See* Mem. P&A Supp. Timken's Mot. J. Agency R. ("Timken's Mem.") at 2, 22–23. Relying on *Timken 1999,* 23 CIT at 518–19, 59 F. Supp. 2d at 1378–79, Timken maintains that this Court: (1) "rejected [Commerce's] inclusion of the line item for 'traded goods' in material costs used to calculate overhead, SG&A and profit ratios in its review of the 1994–95 period," *id.* at 22; and (2) "agreed that [Commerce] had failed to demonstrate how these already manufactured goods constitute a material cost incurred in manufacturing the subject merchandise." *Id.* (internal quotations omitted). Moreover, contrary to Commerce's argument that this Court's decision in *Timken 1999,* 23 CIT 509, 59 F. Supp. 2d 1371, is not yet final, Timken points out that "this Court's decision in *Timken [1999],* did become final and was not appealed." *Id.* (citing *Timken Co. v. United States,* 2000 Ct. Intl. Trade LEXIS 12, *1, Slip. Op. 00–13 (Feb. 8, 2000)). Timken, therefore, argues that this case should be remanded to Commerce with instructions that Commerce exclude "consumption of traded goods from the cost of materials used in the denominator of the overhead, SG&A, and profit ratios" and recalculate the dumping margins accordingly. Timken's Mem. at 23.

Commerce agrees that a remand is necessary to exclude the "consumption of traded goods" from Commerce's overhead, SG&A and profit rate calculations since "consumption of traded goods utilized by Commerce in the *Final Results,* [64 Fed. Reg. at 61,844,] are similar in nature to the 'purchases of traded goods' reviewed by the Court in *Timken [1999].*" Def.'s Mem. Partial Opp'n Timken at 21.

C. Analysis

In *Timken 1999,* 23 CIT 509, 59 F. Supp. 2d 1371, this Court determined that "Commerce failed to demonstrate how these already manufactured goods [that is, purchases of traded goods] constitute a material cost incurred in manufacturing the subject merchandise." *Id.,* 23 CIT at 519, 59 F. Supp. 2d at 1379.

Because Commerce's inclusion of the "consumption of traded goods" in Commerce's overhead, SG&A and profit rate calculations, and the parties' arguments are practically identical to those presented in *Timken 1999,* 23 CIT 509, 59 F. Supp. 2d 1371, the Court adheres to its reasoning in *Timken 1999,* and remands this issue with instructions that Commerce exclude "consumption of traded goods" from Commerce's overhead, SG&A and profit rate calculations and to recalculate the dumping margins accordingly.

III. Commerce's Use of Wage Rates from Chapter 5 of the International Labor Office's 1998 Yearbook of Labor Statistics to Value Labor

A. Background

During the POR, Commerce, pursuant to 19 C.F.R. § 351.408(c)(3) (1998), used a regression-based wage rate to value labor costs. *See Preliminary Results,* 64 Fed. Reg. at 36,856. Commerce explained that

> [b]ecause of the variability of wage rates in countries with similar levels of per capita Gross Domestic Product (GDP), section 351.408(c)(3) of [Commerce's] regulations (19 CFR Part 351, April 1998) requires the use of a regression-based wage rate. Therefore, to value the labor input, [Commerce] used the PRC regression-based wage rate published by Import Administration on its website, which was last revised on May 1999. The source of the wage rate data on the Import Administration's website is the *1998 Yearbook of Labour Statistics,* published by the International Labour Office (ILO) * * * Chapter 5: Wages in Manufacturing.

Def.'s Mem. Partial Opp'n Timken, App. Ex. 3 at 4.

In the *Final Results,* Commerce valued the PRC labor costs by utilizing the wage rates reported in Chapter 5 of the 1998 Yearbook instead of the labor costs reported in Chapter 6A of the 1998 Yearbook as proposed by Timken.[14] Commerce determined that

> [Commerce's] regulations at section 351.408(c)(3) state that "[Commerce] will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries." Therefore, to value the labor inputs[,] * * * [Commerce] applied the PRC regression-based wage rate published by the Import Administration on its website, which was last revised in May 1999.
>
> With respect to [Timken's] argument, [Commerce] disagree[s]. The [1998 Yearbook] states that the wage rates, used to calculate the regression analysis are comprehensive wage rates which also includes overtime, bonuses, holiday pay, incentive pay, pay for piecework, and cost-of-living allowances. *See Magnesium from the People's Republic of China, Final Results of Antidumping Duty New Shipper Administrative Review,* 63 Fed. Reg. 3085, 3091 (Jan. 21, 1998). Thus, for purposes of these final results, [Commerce] ha[s] not adjusted the regression-based wage rate used in the preliminary results.

Final Results, 64 Fed. Reg. at 61,842.

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[14] Commerce and Timken point out that the differences between Chapter 5 and Chapter 6A of the 1998 Yearbook are:

> Chapter 6A of the *1998 Yearbook of Labour Statistics* [is] a category of "labour costs" that includes the compensation of employees as well as additional costs borne by the employer such as vocational training, welfare services, the cost of workers' housing, the cost of educational facilities, grants to credit unions, the cost of recruitment, and taxes. * * * [Whereas,] Chapter 5 of the *1998 Yearbook of Labour Statistics* [is] a category of "wage rates" that reflects cash payments received from employers, including overtime, bonuses, holiday pay, incentive pay, pay for piecework, and cost-of-living allowances.

Def.'s Mem. Partial Opp'n Timken at 26 (citing Timken's Mem. at 11).

B. Contentions of the Parties

Timken contends that Commerce's decision to value PRC labor costs by using the wage rates in Chapter 5 of the 1998 Yearbook rather than the labor costs in Chapter 6A of the 1998 Yearbook was not supported by substantial evidence and was contrary to law. *See* Timken's Mem. at 23–25. In particular, Timken argues that: (1) Commerce's use of Chapter 5 wage rates was a departure from Commerce's consistent practice of "interpret[ing] [19 U.S.C. §§ 1677b(c)(1) and (3)] * * * as calling for the use of fully-loaded costs, including all the costs and benefits in addition to basic wage, of employing labor," Timken's Mem. at 23 (citing *10th Annual Review,* 63 Fed. Reg. at 63,848, and *Final Results and Partial Recission of Antidumping Duty Administrative Review of Maganese Metal From the People's Republic of China,* 63 Fed. Reg. 12,440, 12,446 (March 13, 1998)); *see also,* Reply Br. Timken Co. ("Timken Reply") at 2–4; (2) "the record is devoid of evidence that Chapter 5 wage rates [of the 1998 Yearbook] are comprehensive," Timken's Mem. at 24, because "[f]or example, the wage rates in Chapter 5 did not include additional costs for employers' social security expenditures or welfare services * * * [and these] costs [are not] captured anywhere else in [Commerce's] calculation," Timken's Reply at 6–7; and (3) "[a] broad reading of 'wage rates' in § 351.408(c)(3), which calls for use of fully-loaded labor costs when available, would save the regulation from running afoul of the statutory scheme." Timken's Reply at 9 (emphasis omitted). Timken, therefore, asserts that a remand is necessary so that Commerce can value PRC labor costs using Chapter 6A of the 1998 Yearbook or, in the alternative, "explain why [Commerce's] departure from established practice was lawful in the face of the statute and statutory scheme." Timken's Reply at 8; *see also* Timken's Mem. at 25. In the alternative, Timken argues that, if the Court sustains Commerce's use of Chapter 5 wage rates, the Court should "require [Commerce] to account for all labor costs not included in Chapter 5 wage rates elsewhere in [Commerce's] calculation." Timken's Reply at 9.

Additionally, Timken maintains that Commerce's "labor cost methodology should be the same for calculating constructed value and factors of production." *Id.* at 5; *see also id.* at 9 (stating that "the statutory scheme calls for costs included in constructed value and factors of production to be the same").[15] Responding to Commerce's argument that 19 U.S.C. § 1677b(c)(1), 19 U.S.C. § 1677b(c)(3), and 19 C.F.R. § 351.408(c)(3) do not require Commerce to use comprehensive costs in valuing labor, Timken maintains that this argument "must be rejected

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[15] The Court disagrees with Timken's argument that Commerce's labor cost methodology should be the same for calculating constructed value and factors of production. Unless Commerce interprets the very same terms differently for the purpose of interrelated statutes during the same review, Commerce could utilize the interpretations that Commerce could reasonably derive from the gists of the respective statutes. The Court can envision a distinction between 19 U.S.C. § 1677b(a) and 19 U.S.C. § 1677b(c)(1). Moreover, with respect to Timken's argument that "Generally Accepted Accounting Principles ["GAAP"] * * * call for the use of fully absorbed costs of producing the subject merchandise," Timken's Reply at 4, the Court observes that GAAP serves as a guide and Commerce is not statutorily bound by GAAP when valuing PRC labor costs.

as a *post hoc* rationalization because [Commerce] did not take this position" in *Final Results*, 64 Fed. Reg. at 61,842.[16] *Id.* at 7.

In response, Commerce asserts that its decision to use Chapter 5 wage rates to value PRC labor costs is supported by substantial evidence and is in accordance with law. *See* Def.'s Mem. Partial Opp'n Timken at 21–26. Commerce argues that 19 U.S.C. § 1677b(c)(3) does not require Commerce "to utilize comprehensive costs for purposes of valuing labor [but] [r]ather, the statute merely directs [Commerce] to value the 'hours of labor required' as part of the [FOP] utilized in producing the merchandise." *Id.* at 25. Commerce further argues that Commerce complied with 19 C.F.R. § 351.408(c)(3) in using Chapter 5 wage rates rather than Chapter 6A labor costs to value PRC labor costs because: (1) 19 C.F.R. § 351.408(c)(3) "does not provide that Commerce must utilize comprehensive labor costs [but] [i]nstead, that * * * '[Commerce shall] use regression-based wage rates,'" *id.* (quoting 19 C.F.R. § 351.408(c))(3)) (emphasis omitted); (2) 19 C.F.R. § 351.408(c)(3) is silent as to the particular source Commerce is to use to value wages, *see* Def.'s Mem. Partial Opp'n Timken at 26; and (3) Commerce's preference to use Chapter 5 wage rates over Timken's preference to use Chapter 6A labor costs to value PRC labor costs should be sustained because "the Court should defer to Commerce's interpretation of [the] regulation, not Timken's interpretation." *Id.*

C. Analysis

As a preliminary matter, the Court finds that Commerce's decision to use the wage rates of Chapter 5 of the 1998 Yearbook over the labor costs of Chapter 6A of the 1998 Yearbook to value the PRC labor costs was a justifiable change of methodology as long as such change in position was reasonably supported by the record. *See supra* Discussion Part I, C1 (Analysis).

The applicable statute provides that, when dealing with imports from an NME country such as the PRC, Commerce shall determine the NV of the subject merchandise based on FOPs utilized in producing the merchandise and that Commerce shall value the reported FOPs based on the best available information regarding the values of FOPs in an appropriate market economy. *See* 19 U.S.C. § 1677b(c)(1). According to section 1677b(c)(3), the FOPs to be utilized in valuing merchandise from an NME include, but are not limited to: "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." The statute further provides that while conduct-

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[16] The Court disagrees with Timken that Commerce's argument amounts to a *post hoc* rationalization. Commerce's decision to employ an easier and, in Commerce's view, a more accurate methodology to value PRC labor costs, falls within Commerce's power and the Court will uphold such methodology as long as it is reasonable. *See Final Results*, 64 Fed. Reg. at 61,842 (stating that the wage rates of Chapter 5 "are comprehensive wage rates"). Moreover, a legal argument entered by Commerce in its capacity as a defendant to a civil action with respect to the level of discretion offered by the relevant statute and regulation does not amount to a *post hoc* rationalization since Commerce argues its position within the parameters of common law litigation. If Timken's argument is taken to its logical conclusion, every argument by every party with respect to the legal boundaries of any applicable provision should be deemed a form of *post hoc* rationalization.

ing NME investigations, Commerce "shall utilize, to the extent possible, the prices or costs of [FOPs] in one or more market economy countries that are[:] (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *See* 19 U.S.C. § 1677b(c)(4).

Moreover, the relevant regulation provides:

> [f]or labor, [Commerce] will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. [Commerce] will calculate the wage rate to be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public.

19 C.F.R. § 351.408(c)(3).

In the case at bar, Commerce used the wage rates reported in Chapter 5 of the 1998 Yearbook, which were "made available to the public by means of Import Administration's website," to value the PRC labor costs. Def.'s Mem. Partial Opp'n Timken at 24. "The [1998 Yearbook] states that the wage rates [that is, the wage rates of Chapter 5], used to calculate the regression analysis are comprehensive wage rates which also includes overtime, bonuses, holiday pay, incentive pay, pay for piecework, and cost-of-living allowances." *Final Results*, 64 Fed. Reg. at 61,842. Based on the foregoing, the Court finds that Commerce's decision to value PRC labor costs by using wage rates reported in Chapter 5 of the 1998 Yearbook over the labor costs reported in Chapter 6A of the 1998 Yearbook was reasonable, in accordance with law (that is, Sections 1677b(c)(1), (c)(3), (c)(4) and 19 C.F.R. § 351.408(c)(3)), supported by substantial evidence, and in accord with the purpose of the statutory scheme of determining antidumping margins as accurately as possible.[17] *See Peer Bearing Co. v. United States*, 25 CIT ___, ___, 182 F. Supp. 2d 1285, 1305 (2001) (pointing out that "'[i]n the absence of a statutory mandate to the contrary, Commerce's actions must be upheld as long as they are reasonable'" (quoting *Timken 1999*, 23 CIT at 516, 59 F. Supp. 2d at 1377)); *see also Chevron*, 467 U.S. at 844–45, *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

IV. Commerce's Use of a PRC Producer's Market Economy Import Data

A. Background

In the *Preliminary Results*, Commerce stated that a PRC producer purchased part of its steel sheet directly from a market-economy supplier and paid for such steel with market-economy currency. *See* 64 Fed.

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[17] Timken, in support of its argument that the Court should "require [Commerce] to account for all labor costs not included in Chapter 5 wage rates elsewhere in [Commerce's] calculation [that is, for example in the SG&A expenses,]" Timken's Reply at 9, provided the Court with a letter dated January 8, 2001 indicating among other things that the 12th Administrative Review's *Issues and Decision Memo for the 1998–99 Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results* "is * * * relevant to Timken's position in the instant judicial review" with regard to labor costs. Timken's January 8, 2001, letter (citing Ex. 2 at 16–17). The Court is not persuaded by Timken's reference to the 12th Administrative Review and finds that while it is possible that the labor costs not included in Chapter 5 could have been included elsewhere in Commerce's calculation, the Court's "duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992).

Reg. at 36,856. In the *Final Results*, Commerce used the PRC producer's import data, rather than surrogate data, to value the entire FOP (that is, both the directly imported FOP and the NME sourced FOP). *See* 64 Fed. Reg. at 61,844. Commerce reasoned that,

> [i]n accordance with [Commerce's] established practice and [Commerce's] regulations, [Commerce is] continuing to use the actual prices of directly imported steel to value steel inputs because these prices represent the actual market-based prices incurred in producing the subject merchandise and, as such, are the most accurate and appropriate values for this particular factor for the purpose of calculating NV. As noted by the respondents, this practice has been affirmed in court decisions, such as *Lasko*, [43 F.3d 1442] and is codified in [Commerce's] regulations at section 351.408(c)(1).
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> As noted in [Commerce's] *Final Rule*, [62 Fed. Reg. at 27,366,] while [Commerce] do[es] not view the *Lasko* decision as permitting [Commerce] to use distorted prices, [Commerce] believe[s] that the Court's emphasis on 'accuracy, fairness and predictability' provides [Commerce] with the ability to rely on prices paid by NME producers to market-economy suppliers in lieu of using surrogate values. * * * [Commerce] disagree[s] with [Timken] that imports into China are unreliable indicators of market values because China's domestic market is distorted by government intervention. While China's NME status indicates that domestic prices in China are unreliable, there is no evidence that domestic distortions impact the price at which market-economy suppliers would offer products for sale to Chinese producers. [Commerce] ha[s] no reason to assume that, when dealing with Chinese importers, market-economy suppliers ignore rules of supply, demand, and profit-seeking behavior within a competitive world market.

Id. at 61,844–45.

Moreover, Commerce observed:

> Even if [Commerce] were to accept [Timken's] argument that excess steel supply in China leads foreign competitors to 'dump' steel on the Chinese market, [Timken] has not presented evidence that there is an excess supply of the particular type of steel used in the production of TRBs nor evidence that such excess supply somehow renders the steel prices being offered to certain Chinese TRB producers by market-economy suppliers unreliable. There are a variety of reasons for setting a particular price higher or lower than a world benchmark in an arm's length transaction. In examining actual sales between private parties, [Commerce] would have to be convinced by evidence on the record that the particular sale in question was in some way unrepresentative of market-economy forces. For example, [Commerce] would be willing to disregard a price paid by an NME producer to a market-economy supplier if the quantity of the input purchased in a given transaction is, for example, less than the volume that would normally be traded. Where the transaction is not in commercial quantities, the price may not be truly representative of a market price.

Id. at 61,845.

B. Contentions of the Parties

1. Timken's Contentions

Timken argues that Commerce's determination that a PRC bearing producer's import price[18] constituted the "best available information" under 19 U.S.C. § 1677b(c)(1) to value steel sheet was contrary to 19 U.S.C. § 1677b(c)(1) and unsupported by substantial evidence because Commerce failed to determine whether the price paid by the PRC bearing producer to the market-economy supplier was "market-driven" or representative of market prices. *See* Timken's Mem. at 25–34. In particular, Timken maintains that Commerce "should not assume that Chinese bearing producers are paying world market prices for imported inputs," *id.* at 27 (emphasis omitted), because: (1) "[l]egislative history * * * warns that the 'best' information cannot be prices believed or suspected to be dumped or subsidized," Timken's Reply at 15; (2) "NME markets are 'riddled with distortions' * * * [and] State-controlled economies control the entities that engage in foreign trade, as well as their sales prices," Timken's Mem. at 29 (quoting *Georgetown Steel Corp. v. United States,* 801 F.2d 1308, 1315 (Fed. Cir. 1986)); (3) "third countries do not necessarily trade with China on a market-economy basis," Timken's Mem. at 30; and (4) "China was the world's biggest steel producer with excess capacity during the period of review * * * [and, therefore,] Chinese bearing producers * * * could have easily sourced their material inputs from domestic suppliers." *Id.; see also* Timken's Reply at 21 n.11.

Timken further argues that Commerce's presumption that the PRC bearing producer's import price constituted the "best available information" to value the steel sheet used in the production of cages "was tantamount to [a] conclusive presumption * * * and was * * * inconsistent" with 19 U.S.C. § 1677b(c)(1) and 19 C.F.R. § 351.408(c)(1).[19] Timken's Reply at 17. Relying on the CAFC's decision in *Delverde, SRL v. United States,* 202 F.3d 1360 (Fed. Cir. 2000), Timken maintains that just as the CAFC "found that [Commerce] erred when [Commerce] failed to consider the 'facts or circumstances of the sale,' to produce evidence to show a subsidy, or to make the specific findings required by [19 U.S.C. § 1677(5),]" *id.* at 14 (quoting *Delverde,* 202 F.3d at 1367), the Court in this case should disapprove Commerce's determination that the PRC bearing producer's import price constituted the "best available information" to value the steel sheet at issue because, "[a]nalogously to what [Commerce] did in *Delverde,* [Commerce in the case at bar] simply presumed that the import price[] w[as] the 'best' information without testing the facts in any way, much less producing evidence to support [Commerce's] finding of fact." Timken's Reply at 16.

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[18] The Court notes that the PRC bearing producer's import price was the same for all of the imported steel sheet from the market-economy supplier. *See* Def.'s Mem. Partial Opp'n Timken, Proprietary App. Ex. 1.

[19] In its reply brief, Timken asserts that Commerce's use of the word "normally" in 19 C.F.R. § 351.408(c)(1) "must be understood as contemplating additional circumstances," that is, circumstances in addition to those indicated by Commerce in *Final Rule,* 62 Fed. Reg. at 27,366, "wherein import prices would be rejected." Timken's Reply at 12 n.8. The Court does not agree with Timken's reading of 19 C.F.R. § 351.408(c)(1). Although the term "normally" refers to a predominate scenario, it does not preclude the same process of analysis in other situations.

Additionally, Timken contends that Commerce has the burden to establish the accuracy of the dumping margins and cannot assign the burden to prove the contrary to interested parties. *See id.* at 17–18. In particular, Timken maintains that Commerce's allocation of the burden of proof on Timken to show that the import price Commerce used was unrepresentative of market-economy forces was unreasonable because: (1) "[w]hile it may be reasonable for [Commerce] to allocate the burden of proof to the party with knowledge or having access to facts, it is unreasonable to allocate such burden to a party that has neither and can only raise questions," *id.* at 18; and (2) "Timken has repeatedly challenged the use of import prices in [various] reviews * * * [and Commerce] has rejected [Timken's] contentions without articulating what is required for Timken to show that such prices are unreliable."[20] *Id.* at 20. Timken, therefore, argues that Commerce "must itself test the import prices to determine whether they are market driven." Timken's Mem. at 32 (emphasis omitted). Timken contends that, "as [Commerce] evaluates market-economy prices to determine whether they are reliable in a market-economy case, [Commerce] should evaluate those prices to determine whether they are reliable in an NME case."[21] Timken's Mem. at 33–34. Timken also contends that Commerce "did not compare the [import] price[] to other world market prices or consider the volume and frequency of imports from a market economy" and "did not consider whether the import price[] w[as] at arm's length, reflected commercial quantities, or reasonably reflected the actual cost of production in a comparable market economy." *Id.* at 32.

Alternatively, Timken argues that "Timken amply rebutted [Commerce's] presumption" that the import data constituted the "best available information" to value the steel sheet at issue. Timken's Reply at 21 (emphasis omitted); *see id.* at 21–24. Specifically, Timken points out that: (1) the import price used by Commerce to value the subject merchandise at issue was based on a sale that predated the POR by over a year "and more information was needed to determine whether that steel was actually used to manufacture the merchandise under review," *id.* at 21 n.12 (proprietary version); (2) a "single purchase was not sufficient to meet [the PRC producer's] steel requirements, and that further inquiry was necessary to determine whether non-price factors affected the sale," *id.*; (3) the import price used by Commerce to value the steel sheet at issue was lower than various benchmarks, *see* Timken's Mem. at 31–32 (proprietary version) (citing Timken's Mem. at 17, Table 3); (4) "[t]here was no evidence supporting [Commerce's] belief that the price the Chinese bearing producers would pay for imported steel would

[20] Timken points out that Commerce, in rejecting Timken's challenges to the use of import prices in various reviews, "has merely suggested that it would reject prices that were not arm's length or for merchandise in quantities that were 'insignificant' or not 'meaningful.'" Timken's Reply at 20. Timken maintains that "this is insufficient to address the host of other potential situations wherein import prices would clearly not be the best available information on the facts." *Id.*

[21] Timken asserts that although *Lasko*, 43 F.3d at 1446, allows Commerce to use import prices from market-economy sources to value FOPs in appropriate situations, "the Court [in *Lasko*] did not address the issue [presented in this case] of whether [Commerce] had an obligation to determine whether the prices * * * were, in fact, market-driven or otherwise reliable." Timken's Reply at 11 n.7.

be unaffected by non-market considerations," Timken's Reply at 22; and (5) Commerce "had no information concerning how [the PRC producer] identified the source of its steel, traced the steel to production during the [POR], or produced from this steel [TRBs] exported to the United States. Nor did [Commerce] know whether the import price represented an ordinary transaction." *Id.* at 22–23 (proprietary version). Timken, therefore, requests that this Court remand the issue to Commerce with instructions "to determine whether or not the import price[] paid to [a] market-economy supplier[] to value steel sheet w[as] market driven * * *." Timken's Reply at 23.

Next, relying on *Shakeproof Assembly,* 23 CIT 479, 59 F. Supp. 2d 1354, Timken contends that Commerce's decision to use a PRC producer's import data to value other purchases (that is, the NME sourced FOP) without "explain[ing] why [the] import [data was] more accurate (or 'meaningful') than surrogate-country values" was unsupported by substantial evidence and was contrary to law.[22] Timken's Reply at 28; *see also id.* at 24–28; Timken's Mem. at 34–37. Timken further contends that "[e]xtending the actual import [data] to the additional relevant steel served to magnify the original error." Timken's Reply at 26. Moreover, responding to Commerce's arguments that 19 C.F.R. § 351.408(c)(1) "(1) * * * permits [Commerce] to determine [NV] based on the company's own market-based experience; (2) * * * leads to more accurate dumping margins * * *; and (3) * * * is consistent with the purpose of the statute [that is, 19 U.S.C. § 1677b(c)(1)] * * *," Timken asserts that these arguments must be rejected as *post hoc* rationalizations because Commerce did not articulate them in *Final Results,* 64 Fed. Reg. 61,844–45.[23] Timken's Reply at 25.

2. Commerce's Contentions

Commerce responds that its determination to value certain steel inputs by using the price paid by a PRC bearing producer to a market-economy supplier was supported by substantial evidence, was in accordance with law and sustained by the CAFC in *Lasko,* 43 F.3d 1442. *See* Def.'s Mem. Partial Opp'n Timken at 26–40. In particular, Commerce points out that the CAFC in *Lasko,* 43 F.3d 1442, recognized that 19 U.S.C. § 1677b(c)(1) "requires Commerce to value factors of production using the 'best available information' and that," the CAFC found that "'the best available information on what the supplies used by the Chinese manufacturers would cost in a market economy country was

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[22] In its reply brief, Timken maintains that "Timken does not argue, as [Commerce] suggests, that [Commerce] incorrectly valued domestically-purchased steel using import prices from a market source, but instead that [Commerce] incorrectly valued the steel imported through a PRC trading company (to be distinguished from a market-[economy] country trading company)." Timken's Reply at 24 n.13 (proprietary version). The Court assumes that Timken's aforementioned statement means that Timken is contesting Commerce's decision to use a PRC producer's import data to value the FOP purchased from a PRC trading company. The record indicates that a PRC producer purchased various portions of the steel sheet at issue (1) directly from a market-economy supplier and paid for such steel with market-economy currency; and (2) from a certain PRC company that imported steel sheet from a certain country to China. *See Preliminary Results,* 64 Fed. Reg. at 36,856; *Final Results,* 64 Fed. Reg. at 61,844; Def.'s Mem. Partial Opp'n Timken, Proprietary App. Exs. 1, 2, 4, 6; Timken's Mem. Prop. Docs. 7, 15, 31, 34.

[23] The Court disagrees with Timken that Commerce's arguments amount to a *post hoc* rationalization. *See supra* Discussion Part III, B (Contentions of the Parties) n.16.

the price charged by those supplies on the international market.'" *Id.* (quoting *Lasko*, 43 F.3d at 1446).

Additionally, with respect to Timken's argument that Commerce erred in its decision to use a PRC bearing producer's import data to value the steel sheet at issue by failing to determine whether the prices paid by the PRC bearing producer to the market-economy supplier were "market-driven" or representative of market prices, Commerce argues that Timken's argument should be rejected because Timken never presented this argument to Commerce in its case brief. *See* Def.'s Mem. Partial Opp'n Timken at 28–31. Commerce alleges that Timken, therefore, "failed to exhaust its administrative remedies with respect to this issue."[24] *Id.* at 28 (emphasis omitted).

In the alternative, Commerce argues that, "[e]ven if Timken has exhausted its administrative remedies, Commerce acted within its discretion by not testing the prices in question to determine whether they were market-driven." *Id.* at 31. In particular, Commerce maintains that: (1) "Commerce properly assumes that, where a factor is purchased from a market economy supplier and purchased with a market economy currency, the price paid for that imported merchandise is not distorted [and could be] appropriately used for purposes of valuing the factor in question [in a manner] * * * consistent with the purpose of the antidumping law," *id.* at 31–32 (citing *Lasko*, 43 F.3d at 1446); (2) "Commerce['s] require[ment that] the party challenging the use of the market economy price [should] present evidence that the price is somehow inappropriate for determining NV" is consistent with Commerce's "'broad discretion in allocating investigative and enforcement resources,'" Def.'s Mem. Partial Opp'n Timken at 32 (quoting *Torrington Co.*, 68 F.3d at 1350); and (3) since Timken fails to present "specific evidence of distortion" with regards to Commerce's use of the PRC producer's import data at issue, "Commerce does not err when it requires [Timken] to substantiate [its] views with record evidence as opposed to mere speculation." Def.'s Mem. Partial Opp'n Timken at 33 (citing *LMI La-Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 460 (Fed. Cir. 1990)).

Finally, with respect to Commerce's determination to value the entire FOP (that is, both the imported FOP and the NME sourced FOP) by us-

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[24] In its reply brief, Timken first points out that "in its case brief, Timken argued":

> [C]oncerning the price of imported steel used for one Chinese producer's cages in the 97–98 review * * *, the unusual circumstances attending the importation indicate that the price was not representative and was indeed "aberrational" and unreliable. All surrogate values, including those based on market economy imports into China, must be reliable and reasonable values to be used for purposes of calculating normal value. * * *
>
> * * * Commerce does not have any reason to relax the require[ment]s of the statute and practice.
>
> To the contrary, Commerce should assume that any imports from market-economy countries are not valued at "reliable" market values, absent evidence that such values are otherwise consistent with world-market prices. The current approach turns this policy on its head—in effect ignoring the market distortions that NME methodology is designed to address.
>
> * * * The statute does not compel Commerce to use factor values that are unreliable or unrepresentative of market economy prices.

Timken's Reply at 29–30 (quoting Timken's Reply Pub. Doc. 132, emphasis omitted).

Second, Timken argues that "[d]uring the hearing, counsel for Timken again explained that [Commerce] was required to test every factor value and repeatedly requested that [Commerce] rethink its regulation." Timken's Reply at 30 (emphasis omitted).

ing a PRC producer's import data, Commerce asserts that Commerce acted within the plain meaning of 19 C.F.R. § 351.408(c)(1). *See* Def.'s Mem. Partial Opp'n Timken at 34–35. Commerce further asserts that 19 C.F.R. § 351.408(c)(1) is a reasonable interpretation of 19 U.S.C. § 1677b(c)(1) because: (1) "Commerce's interpretation is consistent with the fact that dumping is an activity that is 'defined in terms of the marketplace,'" *id.* at 36 (quoting *Lasko,* 43 F.3d at 1446); (2) "Commerce's use of imported prices to value all purchases of the same factor of production results in a more accurate dumping margin because these imported prices reflect[] a market-driven decision by the company in question," Def.'s Mem. Partial Opp'n Timken at 37; and (3) "Commerce's interpretation is consistent with the underlying purposes governing the non-market economy provisions of the statute." *Id.*

Moreover, Commerce argues that Timken's contention regarding Commerce's use of a PRC bearing producer's import data to value the entire FOP at issue "do not demonstrate error in Commerce's determination." *Id.* at 38 (emphasis omitted). Commerce points out that Timken's reliance on *Shakeproof Assembly,* 23 CIT 479, 59 F. Supp. 2d 1354, is mistaken because that "decision[] reviewed a Commerce determination that pre-dated the effective date of 19 C.F.R. § 351.408(c)(1)." *Id.* at 39. Commerce also points out that although "Commerce did not explain [in the *Final Results,* 64 Fed. Reg. at 61,844–45,] why the imports in question were meaningful[,] * * * Timken itself must accept responsibility for the absence of such an explanation because Timken never raised that issue with Commerce." *Id.* Commerce, therefore, contends that Timken failed to exhaust its administrative remedies with respect to this issue.[25] *See id.* at 39–40.

C. Analysis

The applicable statute provides that, when dealing with imports from an NME country such as the PRC, Commerce shall determine the NV of the subject merchandise based on FOPs utilized in producing the merchandise. *See* 19 U.S.C. § 1677b(c)(1). The statute further provides that Commerce shall value the reported FOPs based on the best available information regarding the values of FOPs in an appropriate market economy. *See id.* While conducting NME investigations, Commerce "shall utilize, to the extent possible, the prices or costs of [FOPs] in one or more market economy countries that are[:] (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *See* 19 U.S.C. § 1677b(c)(4).

The CAFC, however, reasoned that "the purpose of the statutory provisions [that is, §§ 1677b(c)(1) and (4)] is to determine antidumping margins 'as accurately as possible.'" *Shakeproof,* 268 F.3d at 1382 (quoting *Lasko,* 43 F.3d at 1446); *see also Olympia 1998,* 22 CIT at 390, 7 F.

[25] Commerce asserts that "[i]ndeed, the proprietary figures referenced by Timken appear to indicate that the amount of imported steel was, in fact, meaningful." Def.'s Mem. Partial Opp'n Timken at 40 n.30 (citing Timken's Reply Prop. Doc. 35).

Supp. 2d at 1000–01 (noting that "accuracy is the touchstone of the anti-dumping statute" and citing *Rhone Poulenc*, 899 F.2d at 1191. Additionally, Commerce's "task in [an NME] investigation is to calculate what [the] * * * costs or prices would be [in the NME] if such prices or costs were determined by market forces." *Tianjin*, 16 CIT at 940, 806 F. Supp. at 1018.

1. Commerce's Decision to Value Certain Steel Inputs by Using the Price Paid by a PRC Bearing Producer

As a preliminary matter, the Court addresses Commerce's argument that Timken failed to exhaust its administrative remedies. The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court. *See Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155, (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action").[26]

The purpose behind the doctrine of exhaustion is to prevent courts from premature involvement in administrative proceedings, and to protect agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967); *see also Public Citizen Health Research Group v. Comm'r, FDA*, 740 F.2d 21, 29 (D.C. Cir. 1984) (pointing out that the "exhaustion doctrine * * * serv[es] four primary purposes: [(1)] it ensures that persons do not flout [legally] established administrative processes * * *; [(2)] it protects the autonomy of agency decisionmaking; [(3)] it aids judicial review by permitting factual development [of issues relevant to the dispute]; and [(4)] it serves judicial economy by avoiding [repetitious] administrative and judicial factfinding and by" resolving sole claims without judicial intervention).

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[26] There is however, no absolute requirement of exhaustion in the Court of International Trade in non-classification cases. *See Alhambra Foundry Co. v. United States*, 12 CIT 343, 346–47, 685 F. Supp. 1252, 1255–56 (1988). Section 2637(d) of Title 28 directs that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." By its use of the phrase "where appropriate," Congress vested discretion in the Court to determine the circumstances under which it shall require the exhaustion of administrative remedies. *See Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998). Therefore, because "each exercise of judicial discretion [does] not requir[e] litigants to exhaust administrative remedies," the court is authorized to determine proper exceptions to the doctrine of exhaustion. *Alhambra*, 12 CIT at 347, 685 F. Supp. at 1256 (citing *Timken Co. v. United States*, 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986), *rev'd in part on other grounds, Koyo Seiko Co. v. United States*, 20 F.3d 1156 (Fed. Cir. 1994)).

In the past, the court has exercised its discretion to obviate exhaustion where: (1) requiring it would be futile, *see Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984) ("it appears that it would have been futile for plaintiffs to argue that the agency should not apply its own regulation"), or would be "inequitable and an insistence of a useless formality" as in the case where "there is no relief which plaintiff may be granted at the administrative level," *United States Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982); (2) a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and the new decision might have materially affected the agency's actions, *see Timken*, 10 CIT at 93, 630 F. Supp. at 1334; (3) the question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question, *see id.*; *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1337–39 (D.C. Cir. 1983); and (4) plaintiffs had no reason to suspect that the agency would refuse to adhere to clearly applicable precedent. *See Philipp Bros., Inc. v. United States*, 10 CIT 76, 80, 630 F. Supp. 1317, 1321 (1986).

While a plaintiff cannot circumvent the requirements of the doctrine of exhaustion by merely mentioning a broad issue without raising a particular argument, plaintiff's brief statement of the argument is sufficient if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it. *See generally, Hormel v. Helvering,* 312 U.S. 552 (1941); *see also Rhone Poulenc,* 899 F.2d at 1191. The sole fact of an agency's failure to address plaintiff's challenge does not invoke the exhaustion doctrine and shall not result in forfeiture of plaintiff's judicial remedies. *See generally, B-West Imports, Inc. v. United States,* 19 CIT 303, 880 F. Supp. 853 (1995). An administrative decision not to address the issue cannot be dispositive of the question whether or not the issue was properly brought to the agency's attention. *See, e.g., Allnutt v. United States DOJ,* 2000 U.S. Dist. LEXIS 4060 (D. Md. 2000).

In the case at bar, Timken sufficiently provided Commerce with an opportunity to address the issue of Commerce's failure to determine whether the price paid by the PRC bearing producer to the market-economy supplier was "market-driven" or representative of market prices when Timken in its case brief argued *inter alia* that: (1) "'the unusual circumstances attending the importation indicate that the price was not representative and was indeed 'abberrational' and unreliable,'" Timken's Reply at 29 (quoting Timken's Reply Pub. Doc. 132, emphasis omitted); (2) "'Commerce should assume that any imports from market-economy countries are not valued at 'reliable' market values, absent evidence that such values are otherwise consistent with world-market prices,'" *id.;* (3) "'[Commerce's] current approach * * * in effect ignor[es] the market distortions that NME methodology is designed to address,'" *id.* at 29–30 (quoting Timken's Reply Pub. Doc. 132); and (4) "'[t]he statue does not compel Commerce to use factor values that are unreliable or unrepresentative of market economy prices.'" *Id.* at 30 (quoting Timken's Reply Pub. Doc. 132, emphasis omitted). Moreover, at the administrative level, counsel for Timken "explained that [Commerce] was required to test every factor value and repeatedly requested that [Commerce] rethink its regulation." Timken's Reply at 30 (emphasis omitted).

The Court, therefore, concludes that Timken properly exhausted its administrative remedies and has the right to raise this issue to the Court.

The Court disagrees with Timken's argument that since Commerce did not use the mode of examination offered by Timken on the issue, that is, whether the price paid by a PRC bearing manufacturer to a market-economy supplier was market-driven or representative of market-prices, Commerce's determination to value certain steel inputs by using the price paid by the PRC bearing producer was contrary to 19 U.S.C. § 1677b(c)(1) and unsupported by substantial evidence.

First, the Court is not persuaded by Timken's reliance on the CAFC's decision in *Delverde,* 202 F.3d 1360, for the proposition that this Court

should disapprove Commerce's determination that the PRC bearing producer's import price constituted the "best available information" to value the steel sheet at issue because, "[a]nalogously to what [Commerce] did in *Delverde,* [Commerce in the case at bar] simply presumed that the import price[] w[as] the 'best' information without testing the facts in any way, much less producing evidence to support [Commerce's] finding of fact." Timken's Reply at 16. As the Court in *Lasko Metal,* 16 CIT at 1081, 810 F. Supp. at 317, stated: "[T]he cost for raw materials from a market economy supplier, paid in convertible currencies, provides Commerce with the closest approximation of the *cost of producing the goods in a market economy country.*" 16 CIT at 1081, 810 F. Supp. at 317 (emphasis supplied).

> "[W]here we can determine that a [non-market economy] producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when marketbased values are available would, in fact, *be contrary to the intent of the law.*"

Shakeproof, 268 F.3d at 1382 (emphasis in original) (quoting *Lasko,* 43 F.3d at 1446); *accord Oscillating Fans,* 56 Fed. Reg. at 55,275.

Therefore, the cost for raw materials from a market-economy supplier, paid in convertible currency, constitutes an alternative market-driven price for the purpose of valuation.

In the case at bar, Commerce determined that the import price paid by a PRC bearing producer in market-economy currency to a market-economy supplier represented the "best available information" to value the steel sheet at issue. Commerce reasoned:

> In accordance with [Commerce's] established practice and [Commerce's] regulations, [Commerce is] continuing to use the actual prices of directly imported steel to value steel inputs because these prices represent the actual market-based prices incurred in producing the subject merchandise and, as such, are the most accurate and appropriate values for this particular factor for the purpose of calculating NV. As noted by the respondents, this practice has been affirmed in court decisions, such as *Lasko,* [43 F.3d 1442] and is codified in [Commerce's] regulations at section 351.408(c)(1).

Final Results, 64 Fed. Reg. at 61,844–45.

The Court finds that Commerce's determination to value certain steel inputs by using the price paid by a PRC bearing producer to a market-economy supplier is reasonable and is in accordance with 19 U.S.C. § 1677b(c)(1) and 19 C.F.R. § 351.408(c)(1). *See Peer Bearing,* 25 CIT at ____, 182 F. Supp. 2d at 1305 ("'In the absence of a statutory mandate to the contrary, Commerce's actions must be upheld as long as they are reasonable'" (quoting *Timken 1999,* 23 CIT at 516, 59 F. Supp. 2d at 1377)); *see also Chevron,* 467 U.S. at 844–45, and *Skidmore,* 323 U.S. at 139–40.

Second, the Court disagrees with Timken's argument that Commerce unreasonably allocated the burden of proof to Timken to show that the import data Commerce used to value certain steel inputs was unrepresentative of market-economy forces. As Commerce correctly notes,

"Commerce does not err when it requires parties to substantiate their views with record evidence as opposed to mere speculation." Def.'s Mem. Partial Opp'n Timken at 33 (citation omitted).

During the POR, Commerce stated:

> [Commerce] disagree[s] with [Timken] that imports into China are unreliable indicators of market values because China's domestic market is distorted by government intervention. While China's NME status indicates that domestic prices in China are unreliable, there is no evidence that domestic distortions impact the price at which market-economy suppliers would offer products for sale to Chinese producers. [Commerce] ha[s] no reason to assume that, when dealing with Chinese importers, market-economy suppliers ignore rules of supply, demand, and profit-seeking behavior within a competitive world market.

Final Results, 64 Fed. Reg. at 61,845.

Commerce observed:

> Even if [Commerce] were to accept [Timken's] argument that excess steel supply in China leads foreign competitors to "dump" steel on the Chinese market, [Timken] has not presented evidence that there is an excess supply of the particular type of steel used in the production of TRBs nor evidence that such excess supply somehow renders the steel prices being offered to certain Chinese TRB producers by market-economy suppliers unreliable. There are a variety of reasons for setting a particular price higher or lower than a world benchmark in an arm's length transaction. In examining actual sales between private parties, [Commerce] would have to be convinced by evidence on the record that the particular sale in question was in some way unrepresentative of market-economy forces. For example, [Commerce] would be willing to disregard a price paid by an NME producer to a market-economy supplier if the quantity of the input purchased in a given transaction is, for example, less than the volume that would normally be traded. Where the transaction is not in commercial quantities, the price may not be truly representative of a market price.

Id.

Moreover, with respect to Timken's generalization that "Chinese bearing producers are [not] paying world market prices for imported inputs," Timken's Mem. at 27 (emphasis omitted), the Court finds that Timken's arguments amount to mere speculation. Similarly, with regards to Timken's contention that Timken "amply rebutted [Commerce's] presumption" that the import data constituted the "best available information" to value the steel sheet at issue, Timken's Reply at 21, the Court is unconvinced. The Court holds that Commerce did not unreasonably allocate the burden of proof to Timken to show that the import data Commerce used to value certain steel inputs was unrepresentative of market-economy forces.

Finally, the Court disagrees with Timken's arguments that: (1) "as [Commerce] evaluates market-economy prices to determine whether they are reliable in a market-economy case, [Commerce] should [use the

same mode to] evaluate those prices to determine whether they are reliable in [an] NME case,"[27] Timken's Mem. at 33–34; and (2) Commerce was obligated to examine the volume and frequency of Luoyang's market-economy purchases. *See Timken Co.*, 26 CIT at ____, 201 F. Supp. 2d at 1337 (citing *Final Results of Antidumping Duty Administrative Review of Certain Helical Spring Lock Washers From the People's Republic of China*, 62 Fed. Reg. 61,794, 61,796 (Nov. 19, 1997), and *Final Rule*, 62 Fed. Reg. at 27,366, and stating that "[a]s Commerce correctly notes, * * * it is [Commerce's] practice to consider the volume of market-economy purchases for purposes of determining whether to value domestically-purchased inputs based upon the value of imports from a market-economy country").

Accordingly, the Court affirms Commerce's decision to value certain steel inputs by using the price paid by a PRC producer to a market-economy supplier.[28]

2. Commerce's Decision to Value the Entire FOP by Using the Price Paid by a PRC Bearing Producer

In applying the FOP methodology to an NME, if Commerce finds that actual costs represent the "best available information," Commerce has the discretion to take a combined approach and to consider actual costs paid by the NME producer for each FOP. *See Lasko*, 43 F.3d at 1445–46; *Magnesium Corp. of Am. v. United States*, 20 CIT 1092, 1098, 938 F. Supp. 885, 892 (1996). The statute does not specify what constitutes "best available information," nor does it prescribe a specific method for valuing FOP when a portion of the factor to be valued represents a source in the NME itself and a portion of the same FOP represents a source obtained from a market-economy supplier and paid for in market-economy currency.

Moreover, the relevant regulation provides:

> [Commerce] normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, [Commerce] normally will use the price paid to the market economy supplier. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a

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[27] Market-economy cases and non-market economy cases are distinct. *See, e.g., Shakeproof*, 268 F.3d at 1379 n.1. ("The [NV] of goods in 'market economy' cases is generally the price at which the foreign product is first sold in the exporting country. * * * [T]he normal value of goods in [NME] may be instead determined by looking at the 'factors of production' used to manufacture the goods," (citations omitted)); *see also Lasko*, 43 F.3d at 1445 ("[I]f [Commerce] cannot determine [NV] pursuant to the general provisions of [19 U.S.C.] § 1677b(a), then [Commerce] must use the [FOP] methodology to *estimate* [NV] for the merchandise in question" (emphasis in original)).

[28] Timken provided the Court with a letter dated January 8, 2001, indicating, among other things, that the 12th Administrative Review's *Issues and Decision Memo for the 1998–99 Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results* and the *Allegation of Unfair Steel Prices* memorandum, "suggest[s] * * * that [Commerce] ha[s] taken a new position respecting the use of actual market-prices in calculating Chinese values." Timken's January 8, 2001, letter (citing Exs. 2 at 3–8 and 3). The Court is not persuaded by Timken's argument. *See generally, Hoogovens Staal BV v. United States*, 22 CIT 139, 144, 4 F. Supp. 2d 1213, 1218 (1998) (stating that "[w]hatever additional information that persuaded Commerce that [the plaintiffs] had discontinued [their] practice * * * during [the subsequent] period of review was not a part of the record for this review," and "Commerce correctly based its decision on the information in the record").

> nonmarket economy supplier, [Commerce] normally will value the factor using the price paid to the market economy supplier.

19 C.F.R. § 351.408(c)(1).

In the case at bar, Commerce used the PRC producer's import data, rather than surrogate data, to value the entire FOP (that is, both the directly imported FOP and the NME sourced FOP). *See Final Results,* 64 Fed. Reg. 61,844. Commerce, however, admittedly failed to "explain [in the *Final Results,* 64 Fed. Reg. 61,844–45,] why the imports in question were meaningful." Def.'s Mem. Partial Opp'n Timken at 39.

As a preliminary matter, the Court finds that Timken exhausted its administrative remedies and has the right to raise the issue of Commerce's failure to determine whether the imports in question were meaningful because Timken sufficiently provided Commerce with an opportunity to address this issue when Timken in its case brief argued that "Commerce should not assign the Chinese imported steel values to a larger volume of steel inventory than such purchases actually represent." Def.'s Mem. Partial Opp'n Timken, App. Ex. 7 at 24 (proprietary version) (emphasis omitted); *see also supra* Discussion Part IV, C1 (Analysis).

Commerce's failure to address whether the import data at issue was meaningful, however, prevents the Court from reviewing the issue of Commerce's decision to value the entire FOP (that is, both the directly imported FOP and the NME sourced FOP) intelligibly. In the commentary accompanying the promulgation of 19 C.F.R. § 351.408(c)(1) Commerce states that:

> [Commerce] would not rely on the price paid by an NME producer to a market economy supplier if the quantity of the input purchased was insignificant. * * * [T]he amounts purchased from the market economy supplier must be *meaningful.* * * *

Final Rule, 62 Fed. Reg. at 27,366 (emphasis supplied).

Similarly, with respect to Timken's argument that Commerce's decision to use a PRC producer's import data to value other purchases (that is, the NME sourced FOP) without "explain[ing] why [the] import [data was] more accurate (or 'meaningful') than surrogate-country values," Timken's Reply at 28, the Court finds that while the Court's "duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute," *Suramerica,* 966 F.2d at 665, it was illogical for Commerce to utilize a PRC bearing producer's import data to value the entire FOP (that is, both the directly imported FOP and the NME sourced FOP) without explaining why analogously structured PRC trading company data could not be used as a surrogate value.

Based on the foregoing, the Court remands this issue to Commerce with instructions to: (1) explain, with reference to the record, whether or not the PRC bearing producer's import data at issue was "meaningful"; and (2) provide the Court with an explanation as to why the PRC

trading company data is not the "best available information" for the purpose of valuing either the entire FOP (that is, both the directly imported FOP and the NME sourced FOP) or the NME sourced FOP.

V. Commerce's Reliance on Six Indian Producers' Reported Data in Commerce's Determination of Overhead, Selling, General and Administrative Expenses and Profit Rates

A. Background

Section 1677b(c)(1) of Title 19 requires Commerce to "determine the [NV] of the subject merchandise on the basis of the value of the [FOPs] utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." General expenses are the expenses that do not bear a direct relationship to the production of the merchandise at issue, such as SG&A expenses. The subsection also states that the valuation of FOPs "shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." *Id.* Section 1677b(c)(4) provides that, in valuing FOPs under paragraph (1) of § 1677b(c), Commerce "shall utilize, to the extent possible, the prices or costs of [FOPs] in one or more market economy countries. * * *"

Moreover, the relevant regulation provides

> [f]or manufacturing overhead, general expenses, and profit, [Commerce] normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.

19 C.F.R. § 351.408(c)(4) (1998).

In the *Preliminary Results*, Commerce used "information obtained from the fiscal year 1997–98 annual reports of six Indian bearing producers" as surrogate values for factory overhead, SG&A and profit.[29] 64 Fed. Reg. at 36,856; *see also* Def.'s Mem. Partial Opp'n Timken, App. Ex. 3.

Specifically, Commerce

> calculated factory overhead and [SG&A] expenses (exclusive of labor and electricity) as percentages of direct inputs (also exclusive of

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[29] In Commerce's June 30, 1999, decision memorandum discussing the FOP values used for the *Preliminary Results*, 64 Fed. Reg. at 36,856, Commerce stated:

> To calculate surrogate values for factory overhead and SG&A, [Commerce] first categorized all of the non-direct expenses (excluding labor) of six Indian bearings producers, as reported in their 1997–98 annual reports, as either overhead or SG&A, as appropriate. [Commerce] ha[s] excluded the data for Asian Bearings ["Asian"] and [National Engineering Company] ["NEI"] in calculating surrogate overhead, SG&A and profit ratios primarily because, according to the Auditor's Reports, the methodology used in recording and reporting the financial condition of these two companies appears, in certain instances, to be inconsistent with the methodology (*i.e.*, Indian GAAP) used by the remaining five companies. Given these significant differences, it would be incongruous to combine the reported data of all seven companies.

Def.'s Mem. Partial Opp'n Timken, App. Ex. 3 at 4–5.

Additionally, Commerce in its brief states with respect to NEI's annual report that

> Note 11 to the auditors' report provided that "[n]o provision has been made for Doubtful debts & advances aggregating Rs 183.65 lacs (Previous year Rs 149.37 lacs)." Note 22 to the auditors' report provided that "[t]he Company has not made provision for the Leave liability of employees (amount unascertained) and the same as per consistent practice will be accounted for as and when paid."

Def.'s Mem. Partial Opp'n Timken at 6 (quoting Def.'s Mem. Partial Opp'n Timken, Proprietary App. Ex. 5 (NEI Annual Report) at 26 and 27)); *see also* Def.'s Mem. Partial Opp'n Timken, Proprietary App. Ex. 5 (NEI Annual Report) at 11.

> labor) and applied these ratios to each producer's direct input costs. For profit, [Commerce] totaled the reported profit before taxes for the six Indian bearing producers and divided it by the total calculated cost of production ("COP") of goods sold. This percentage was applied to each respondent's total COP to derive a company-specific profit value.

Preliminary Results, 64 Fed. Reg. at 36,856.

In the *Final Results,* during the review at issue, Commerce continued to use data from only six of the Indian bearing producers and excluded data from Asian and NEI by stating:

> [Commerce] disagree[s] with [Timken] and has[s] excluded the data for Asian Bearing and NEI in calculating surrogate overhead, SG&A and profit ratios because, according to the Auditor's Reports, the methodology used in recording and reporting the financial condition of these two companies appears, in certain instances, to be inconsistent with the methodology *(i.e.,* Indian GAAP) used by the remaining six companies.
>
> In this review, the Auditor's Report included with Asian Bearing's 1997–98 financial statements expresses a clear reservation about how certain interest expenses (with their corresponding effects on depreciation and other expenses) have been reported, noting that the methodology is not in accordance with accounting principles recommended by the Institute of Chartered Accountants of India. The Auditor's Report also notes that Asian Bearing continues to be a "sick" company as defined by India's Sick Industrial Companies Act. Likewise, the auditors' endorsement of NEI's 1997–98 Financial Statements, as contained in the Auditor's Report, includes qualifications regarding the company's treatment of various overhead and SG&A expenses. As in *[the 10th Annual Review,* 63 Fed. Reg 63,842], the qualifications indicate that the treatment of these expenses is not consistent with Indian GAAP.
>
> Given these significant differences, it would be incongruous to combine the reported data of all eight companies.

Final Results, 64 Fed. Reg. at 61,842–43.

B. Contentions of the Parties

1. Timken's Contentions

Timken alleges that Commerce's exclusion of NEI from the calculation of overhead, SG&A, and profit ratios "was arbitrary and unreasonable."[30] Timken's Mem. at 40. In particular, Timken argues that Commerce "offered no reason and pointed to no facts that would justify the exclusion of NEI data from the overhead, SG&A, and profit ratios." *Id.* at 38. Timken maintains that: (1) "a comparison of NEI's overhead, SG&A, and profit ratios with the other six companies shows ratios that are well within the range of other Indian bearing producers," *id.* at 38 (citing Timken's Mem. at 19, Table 4); (2) NEI's annual report was au-

[30] The Court notes that, in this case, Timken is not contesting Commerce's exclusion of Asian from the calculation of overhead, SG&A, and profit ratios but only the exclusion of NEI. *See* Timken's Mem. at 5 n.4; *see also* Timken's Mem. at 37–40 and Timken's Reply at 32–35.

dited and approved by Chartered Accountants in India, *see* Timken's Mem. at 19; and (3) "the Auditor's Report reveals only inconsequential omissions," *id.* at 20.

Timken further argues that "the aggregate annual report data of all seven Indian bearing producers would have been more descriptive of the variety of companies in China than the data of only six producers * * *," *id.* at 40, and "the record included the figures necessary to make NEI's annual report data GAAP-compliant." *Id.* at 39. Timken contends, for example, that since NEI's leave data was not provided for in NEI's annual report, Commerce could have "based the profit ratio on an average labor cost of the other six Indian bearing companies or relied on another company's leave data." Timken's Reply at 34.

Finally, Timken asserts that "[a]s there is no evidence that NEI's overhead or SG&A ratios were affected by its accounting methodologies, [Commerce] should at least have used the NEI's data for those factors as the best available information for Indian bearing producers." Timken's Reply at 34 (citing 19 U.S.C. § 1677b(c)(1)).

2. Commerce's Contentions

Commerce responds that it properly used data from only six of the Indian bearing producers and excluded the annual report data contained in NEI when calculating the ratios for overhead, SG&A and profit. *See* Def's Mem. Partial Opp'n Timken at 40–42. Commerce explained that it rejected NEI's annual report data because

> "the auditors' endorsement of NEI's 1997–98 Financial Statements, as contained in the Auditor's Report, includes qualifications regarding the company's treatment of various overhead and SG&A expenses." These qualifications reveal that NEI made no provision for doubtful debts and advances or for the leave liability of employees. * * * Commerce found these qualifications to be significant because they were inconsistent with Indian generally accepted accounting principles ("GAAP") utilized by the other six companies.

Id. at 41 (quoting *Final Results*, 64 Fed. Reg. at 61,842).

Moreover, relying on *Writing Instrument*, 21 CIT at 1195, 984 F. Supp. at 639, Commerce argues that "in determining whether a surrogate value represents the best available information, Commerce is authorized to determine the reliability of that value and, if it is established that the value is unreliable, decline to use that data for purposes of factor valuation." Def.'s Mem. Partial Opp'n Timken at 41.

C. Analysis

The Court finds that Commerce acted reasonably within its discretion in excluding the annual report data contained in NEI when calculating the ratios for overhead, SG&A and profit. In particular, Commerce pointed out that it rejected NEI's annual report data because

> "the Auditor's Report [of NEI's Financial Statements] includes qualifications regarding the company's treatment of various overhead and SG&A expenses." These qualifications reveal that NEI

> made no provision for doubtful debts and advances or for the leave liability of employees. * * * Commerce found these qualifications to be significant because they were inconsistent with Indian generally accepted accounting principles ("GAAP") utilized by the other six companies.

Id. at 41 (quoting *Final Results,* 64 Fed. Reg. at 61,842).

This Court is not in a position to declare such a conclusion unreasonable. *See Chevron,* 467 U.S. at 844–45, and *Skidmore,* 323 U.S. at 139–40; *see also Timken Co.,* 26 CIT at ____, 201 F. Supp. 2d at 1346 (finding that "Timken may not usurp Commerce's role as fact finder and substitute their analysis for the result reached by Commerce").

Accordingly, the Court sustains Commerce's determination to use the annual report data of six Indian bearing producers as a surrogate for determining overhead, SG&A and profit rates as reasonable, in accordance with law and supported by substantial evidence.

CONCLUSION

This case is remanded to Commerce to: (1)(a) examine whether or not the PRC trading company import prices constitute the "best available information" to value either all of the subject merchandise at issue or a portion of the subject merchandise purchased by Luoyang through the trading company and used by Luoyang in the manufacture of TRB cups and cones and, if Commerce concludes that the PRC trading company import prices present the "best available information" for the purpose of such surrogate evaluation, to recalculate Commerce's determination not inconsistent with this opinion; and (b) examine if, and only if, Commerce finds that the PRC trading company import prices do not constitute the "best available information," whether or not Indonesian data (that is, Indonesian import statistics and export data from Japan to Indonesia) constitute the "best available information" over export data from Japan to India to value the bearing quality steel bar used in the production of TRB cups and cones, and to explain, (if Commerce finds that export data from Japan to India is the "best available information,") how the entire export data from Japan to India falls within the range of values in the United States category benchmark range; (2) exclude "consumption of traded goods" from Commerce's overhead, SG&A and profit rate calculations and to recalculate the dumping margins accordingly; and (3) (a) explain, with reference to the record, whether or not the PRC bearing producer's import data at issue was "meaningful"; and (b) provide the Court with an explanation as to why the PRC trading company data is not the "best available information" for the purpose of valuing either the entire FOP (that is, both the directly imported FOP and the NME sourced FOP) or the NME sourced FOP. Commerce's final determination is affirmed in all other respects.

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Dated: September 25, 2002.

LEO M. GORDON,
Clerk of the Court.

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